CUSTOMS BULLETIN AND DECISIONS

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U.S. Customs Service

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and

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This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, November 17, 1999.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

PROPOSED MODIFICATION OF RULING LETTER AND REVOCATION OF TARIFF TREATMENT RELATING TO TARIFF CLASSIFICATION OF A UNISEX GARMENT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter and revocation of treatment relating to tariff classification of a unisex garment.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)), this notice advises interested parties that Customs intends to modify a ruling letter pertaining to the tariff classification of a unisex garment and revoke any treatment previously accorded by Customs to substantially identical merchandise. Comments are invited on the correctness of the proposed action.

DATE: Comments must be received on or before December 31, 1999.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the same address.

FOR FURTHER INFORMATION CONTACT: Rebecca Hollaway, Textiles Branch, (202) 927–2379.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. 1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)(1)), this notice advises interested parties that Customs intends to modify a ruling letter pertaining to the tariff classification of a unisex garment. Although in this notice Customs is specifically referring to one ruling, New York Ruling Letter (NY) D85843, dated January 8, 1999, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)(2)), Customs intends to revoke any treatment previously accorded by Customs to substantially identical merchandise. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule. Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical merchandise or of a specific ruling not identified in this notice, may

raise a rebuttable presumption of a lack of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to the effective date of the final notice of this proposed action.

In NY D85843, set forth as Attachment A, Customs classified a "Galaxy King" costume in subheading 6114.30.3060 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides, in part, for other men's or boys' garments.

It is now Customs position that the article is a unisex garment properly classified under subheading 6104.43.2010, HTSUSA, which provides for "Women's or girls' suits, ensembles, suit-type jackets, blazers, dresses, skirts, divided skirts, trousers, bib and brace overalls, breeches and shorts (other than swimwear), knitted or crocheted: Dresses: Of synthetic fibers: Other: Women's."

Customs intends to modify NY D85843 and to revoke any other ruling not specifically identified, in order to classify this merchandise under subheading 6104.43.2010. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical merchandise. Before taking this action, we will give consideration to any written comments timely received.

Proposed HQ 963338, modifying NY D85843 is set forth as Attachment B to this document.

Dated: November 16, 1999.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
New York, NY, January 8, 1999.

CLA–2–61:RR:NC:3:353 D85843
Category: Classification
Tariff No. 6104.43.2020, 6106.20.2030,
6117.80.9540, 6104.63.2016, and 6114.30.1010

MR. KEN AUGUST
EASTER UNLIMITED, INC.
80 Voice Rd.
Carle Place, NY 11514

Re: The tariff classification of Millennium Women, Futura Galactic Princess and Galaxy King Costumes from Taiwan.

DEAR MR. AUGUST:

In your letter dated December 4, 1998, you requested a classification ruling. A sample was submitted for examination with your request.

Three sample costumes were submitted with you request. Style numbers, 1032 and 1032H, Millennium Woman is a five piece girl's costume which consists of a dress, blouse, glovelets, collar and boot tops. The dress consists of knit polyester fabric and is of hip length design with a metallic trim around the arm opening, and waist. The blouse is of a V neck sleeveless design, glovelets that extend above the elbow with piping and elastic that go around the finger, boot tops that extend from above the knee to the top of the ankle, and a large stand up collar with a hoop and loop closure. The top glovelets, boot tops and collar are of knit man made fiber fabric coated with a metallic looking polyurethane coating. Style 1032H is the same item packaged on a hanger with a photo insert.

Style 1038 and 1038H, Futura Galactic Princess is a five piece girl's costume which consists of a pair of trousers with metallic trim at the bottom of the pant leg, a blouse with a metallic trim and stand up collar, a belt and a pair of glovelets. The trousers, blouse, textile necklace and belt are made from knit polyester fabric and the glovelets are knit man made fiber fabric with a metallic plastic coating. Style 1038H is the same costume packaged on the hanger with a photo insert.

Style 9955 and 9955H, Galaxy King Costume consists of a royal robe trimmed in a metallic gold, a detachable large stand up collar and a knit polyester belt. The robe is made from knit polyester fabric and the collar is a knit man made fiber fabric with a metallic coating. Style 9955H is the same costume packaged on a hanger with a photo insert.

Issue:

Whether the costumes are festive articles of chapter 95 or of textile articles of fancy dress classifiable under chapter 61 or 62.

Law and Analysis

Classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is made in accordance with the General Rules of Interpretation (GRI's). The systematic detail of the harmonized system is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and relative section of the chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and the headings and legal notes do not otherwise require, the remaining GRI's may then be applied. The Explanatory Notes (ENs) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRIs.

Heading 9505, HTSUSA, includes articles which are for "Festive, carnival, or other entertainment." It must be noted, however, that Note 1(e), chapter 95, HTSUSA, does not cover "fancy dress, of textiles, of chapter 61 or 62." The EN's to 9505, state that the heading covers:

> (A) Festive, carnival or other entertainment articles, which in view of their intended use are generally made of non-durable material. They include:
>
> (3) Articles of fancy dress, e.g., masks, false ears and noses, wigs, false beards and moustaches (not being articles of pastiche—heading 67.04), and paper hats. However, the heading excludes fancy dress of textile materials, of chapter 61 or 62.

In interpreting the phrase "fancy dress, of textiles, of chapter 61 or 62," Customs initially took the view that fancy dress included "all" costumes regardless of quality, durability, or the nature of the item. However, Customs has reexamined its view regarding the scope of the term "fancy dress" as it related to costumes. On November 15, 1994, Customs issued Headquarters Ruling Letter (HRL) 957318, which referred to the settlement agreement of October 18, 1994, reached by the United States and Traveler Trading. In HRL 957318, Customs stated that it had agreed to classify as festive articles in subheading 9505.90.6000, costumes of a flimsy nature and construction, lacking in durability, and generally recognized as not being a normal article of apparel.

In view of the aforementioned, Customs must distinguish between costumes of chapter 95 (festive articles), and costumes of chapters 61 and 62 (articles of fancy dress). This can be accomplished by separately identifying characteristics in each article that would indicate whether or not it is of a flimsy nature and construction, lacking in durability, and generally recognized as a normal article of apparel.

The submitted samples are comparable in construction and durability. The Millennium Woman, Futura Galactic Princess and Galaxy King Costume are well made and durable and can be worn many times. The costumes have finished seams and the trim has a sturdy

double piping. The amount of finishing is such that the articles are neither flimsy in nature or construction, nor lacking in durability.

In as much as the Millennium Woman and the Futura Galactic Princess costume consists of two distinct garments, Note 13, Section XI, of the HTSUSA is applicable and provides:

Unless the context otherwise requires, textile garments of different headings are to be classified in their own headings even if put in sets for retail sale.

Note 13 of Section XI requires that the textile garments of different headings be separately classified, thus preventing classification of costumes consisting of two or more garments as sets. If a set cannot exist by application of Note 13, the articles which may be packaged with the garments must also be classified separately. Accordingly the accessory collar, boot tops and glovelets in the Millennium Woman costume and the belt and glovelets and textile necklace in the Futura Galactic Princess costume must also be classified separately.

GRI 3(b) is applicable when goods are, prima facie, classifiable under two or more headings, and have been put up in sets for retail sale. GRI 3(b) states that the goods "shall be classified as if they consisted of the material component which gives them their essential character." In the case of the Galaxy King Costume the collar is governed by GRI 3(b) because this item is packaged as an accessory with a single garment wherein each item in the set is classifiable under a separate heading. Pursuant to GRI 3(b), however, the accessory items is the set are classified in accordance with that article from which the set derives its essential character. Customs believes that the essential character of costumes consisting of a single garment with accessories is generally imparted by that garment, which in this case is the royal robe.

The applicable subheading for the dress (Millennium Woman, style 1032 and 1032H) will be 6104.43.2020, Harmonized Tariff Schedule of the United States (HTS), which provides for "Women's or girls' suits, ensembles, suit-type jackets, blazers, dresses, skirts, divided skirts, trousers. Bib and brace overalls, breeches and shots (other than swimwear), knitted or crocheted: Dresses: Of synthetic fibers: Other, Girls'." The duty rate will be 16.5 percent ad valorem. The textile category designation is 636.

The applicable subheading for the blouse, styles 1032, 1032H 1038 and 1038H will be 6106.20.2030, Harmonized Tariff Schedule of the United States (HTS), which provides for "Women's or girls' blouses and shirts, knitted or crocheted: Of man-made fibers: Other, Girl's: Other." The rate of duty will be 33.3 percent ad valorem. The textile category designation is 639.

The applicable subheading for the glovelets, collar, boot tops and belt and textile necklace for styles 1032, 1032H, 1038 and 1038H will be 6117.80.9540, Harmonized Tariff Schedule of the United States (HTS), which provides for "Other made up clothing accessories, knitted or crocheted parts of garments or of clothing accessories: Other accessories: Other: Other, Of man-made fibers: Other." The rate of duty will be 15 percent ad valorem. The textile category designation is 659.

The applicable subheading for the pants, style 1038 and 1038H will be 6104.63.2028, Harmonized Tariff Schedule of the United States (HTS), which provides for "Women's or girls' suits, ensembles, suit-type jackets, blazers, dresses, skirts, divided skirts, trousers, bib and brace overalls, breeches and shorts (other than swimwear), knitted or crocheted: Trousers, bib and brace overalls, breeches and shorts: Of synthetic fibers: Other: Other, Trousers and breeches: Girls': Other: Other." The rate of duty will be 29.1 percent ad valorem. The textile category designation is 648.

The applicable subheading for the Galaxy King Costume, styles 9955 and 9955H will be 6114.30.3060, Harmonized Tariff Schedule of the United States (HTS), which provides for "Other garments, knitted or crocheted: Of man-made fibers: Other, Other: Men's or boys'." The duty rate will be 15.5 percent ad valorem. The textile category designation is 659.

Based upon international textile trade agreements products of Taiwan are subject to quota and the requirement of a visa.

The designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes. To obtain the most current information available, we suggest that you check, close to the time of shipment, the Status Report on Current Import Quotas (Re-

straint Levels), an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Kenneth Reidlinger at 212–466–5881.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:TE 963338 RH
Category: Classification
Tariff No. 6104.43.2010

MR. KEN AUGUST
FUN • WORLD
80 Voice Road
Carle Place, NY 11514

Re: Modification of NY D85843; classification of the Galaxy King and Galaxy Queen costumes; unisex garments.

DEAR MR. AUGUST:

This is in reply to your letter of March 12, 1999, requesting a ruling on the classification of the purple "Galaxy Queen" costume, style number P9955.

You state that this costume is "*exactly*" the same as the "Galaxy King" costume except for the color. Customs issued a ruling referenced as New York Ruling Letter (NY) D85843, dated January 8, 1999, classifying the Galaxy King costume in subheading 6114.30.3060 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides, in part, for other men's or boys' garments. You believe that classification of the Galaxy Queen costume at the 10-digit level may be different from the Galaxy King's classification.

Upon reviewing NY D85843, we have determined that the classification of the Galaxy King garment in subheading 6114.30.3060 was incorrect. We note that the classification of the other articles in that ruling were correct. Our reasons are set forth below.

Facts:

A description of the Galaxy King costume in NY D85842 reads as follows:

> Style 9955 and 9955H, Galaxy King costume consists of a royal robe trimmed in a metallic gold, a detachable large stand up collar and a knit polyester belt. The robe is made from knit polyester fabric and the collar is a knit man made fiber fabric with a metallic coating. Style 9955H is the same costume packaged on a hanger with a photo insert.

As stated above, the Galaxy Queen costume is identical to the Galaxy King costume in all material respects, although it is purple whereas the Galaxy King costume was blue.

Initially, we note that NY D85843 included a lengthy discussion of whether the Galaxy King costume was classifiable under heading 9505, HTSUSA, which provides for "Festive, carnival or other entertainment articles" or under Chapter 61, HTSUSA, as wearing apparel. Since, it has already been determined that the article is wearing apparel of Chapter 61, and you do not contest that decision, this ruling will only address the correct classification of the article within Chapter 61.

Issue:

What are the correct classifications of the Galaxy King and Galaxy Queen costumes?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's taken in order.

The Galaxy King and Galaxy Queen costumes are sold in retail packages containing items that are classifiable under different headings, *i.e.*, the "robe, collar and belt." Customs has long held that costumes consisting of single garments with accessories may be classifiable as sets by application of GRI 3(b), HTSUSA, according to the item in the set which provides the essential character. Headquarters Ruling Letter 084322, dated August 23, 1989, and HQ 084731, dated September 7, 1989.

The factors which determine the essential character of an article vary from case to case. Essential character may be derived from the nature of the materials or components, the material's or component's bulk, quantity, weight, value, or the role played in relation to the use of the goods. In general, essential character has been construed to mean the attribute which strongly marks or serves to distinguish what an article is—that which is indispensable to the structure or condition of an article.

Customs believes that the essential character of costumes consisting of a single garment with accessories is generally imparted by the garment, which is in this case the "robe." See, HQ 084322 and HQ 084731, *id*.

In NY D85843, Customs classified the Galaxy King costume in subheading 6114.30.3060 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides, in part, for other men's or boys' garments.

After examining pictures of the two garments, we agree with you that they are "*exactly*" the same except for their color. Moreover, we note that there are no features which distinguish them as men's or boys' versus women's or girls' garments. Note 9, Chapter 61, HTSUSA, reads:

> Garments of this chapter designed for left over right closure at the front shall be regarded as men's or boys' garments, and those designed for right over left closure at the front as women's or girls' garments. These provisions do not apply where the cut of the garment clearly indicates that it is designed for one or other of the sexes.
>
> Garments which cannot be identified as either men's or boys' garments or as women's or girls' garments are to be classified in the headings covering women's or girls' garments.

Accordingly, since the Galaxy King and Galaxy Queen costumes exhibit no characteristics, apart from their title, which distinguishes their gender they shall be classified in heading 6104, HTSUSA, as women's or girls' garments.

Holding:

The Galaxy King and Galaxy Queen costumes are classifiable under subheading 6104.43.2010, HTSUSA, which provides for "Women's or girls' suits, ensembles, suit-type jackets, blazers, dresses, skirts, divided skirts, trousers, bib and brace overalls, breeches and shorts (other than swimwear), knitted or crocheted: Dresses: Of synthetic fibers: Other: Women's." They are dutiable at the general column one rate at 16.5 percent *ad valorem* and the textile category is 636.

NY D85843 is hereby modified.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION AND REVOCATION OF RULING LETTERS AND REVOCATION OF TARIFF TREATMENT RELATING TO TARIFF CLASSIFICATION OF CERTAIN CRAFT SETS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of one tariff classification ruling letter, proposed revocation of one tariff classification ruling letter, and revocation of treatment relating to tariff classification of craft sets, put up for retail sale.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)), this notice advises interested parties that Customs intends to modify a ruling letter, and revoke another ruling letter, pertaining to the tariff classification of certain craft sets under the Harmonized Tariff Schedule of the United States (HTSUS), and revoke any treatment previously accorded by Customs to substantially identical transactions. Comments are invited on the correctness of the proposed action.

DATE: Comments must be received on or before December 31, 1999.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the same address.

FOR FURTHER INFORMATION CONTACT: Gail A. Hamill, Textile Classification Branch, (202) 927–1342.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. 1484) the importer of record is responsible for

using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)(1)), this notice advises interested parties that Customs intends to modify a ruling letter, and revoke another ruling letter, pertaining to the tariff classification of certain craft sets. Although in this notice Customs is specifically referring to two rulings, NY D81180 and HQ 085267, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)(2)), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule. Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise a rebuttable presumption of a lack of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final notice of this proposed action.

In HQ 085267, dated May 9, 1990, and NY D81180, dated September 25, 1998, set forth as Attachment A and B to this document, Customs classified a jacket and felt tipped markers set, and a silk tie and fabric paint set, with accompanying articles to complete the decorating of the articles, not as sets put up for retail sale, but rather each article as separately classifiable under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA).

It is now Customs position that both craft kits are sets put up for retail sale. The jacket and marker set is properly classified under subheading 6210.10.9040, HTSUSA, as a garment made up of fabrics of heading 5602, 5603, 5903, 5906 or 5907, of fabrics of heading 5602 or 5603, other, other, other, other. The silk tie and fabric paint set is properly classified under subheading 6215.10.0025, HTSUSA, which provides for ties, bow ties and cravats, of silk or silk waste, containing 50 percent or more by weight (including any linings and interlinings) of textile materials other than silk or silk waste. See draft HQ 962355 for other re-

lated sets and their classification. In both cases, the goods are put up together to carry out the specific activity of decorating an article of clothing in a craft project context, and therefore meet the Explanatory Note criteria (b) of fulfilling a specific activity. The reasoning as to sets criteria (b) set forth in NY D81180 and HQ 085267 is specifically revoked. A set may be put up together to meet a particular need or carry out a specific activity, such as painting or decorating an article of clothing, and yet be capable of disassembly into articles useful for other purposes. The focus in criteria (b) is whether they work together to meet a need or carry out an activity, not whether that is all they are capable of doing. In addition, the essential character of both sets is provided by the decorated article.

Customs intends to modify HQ 085267 and revoke NY D81180 and any other ruling not specifically identified, in order to classify this merchandise as sets put up for retail sale under the HTSUSA. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. Before taking this action, we will give consideration to any written comments timely received. Proposed HQ 963475, modifying HQ 085267, and proposed HQ 962355, revoking NY D81180, are set forth as Attachment C and D to this document.

Dated: November 5, 1999.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC, May 9, 1990.

CLA–2 CO:R:C:G: 085267 DPS
Category: Classification
Tariff No. 4911.99.6000, 6210.10.4025,
9503.70.8000, and 9608.20.0000

JOHN M. PETERSON, ESQUIRE
NEVILLE, PETERSON & WILLIAMS
39 Broadway
New York, NY 10006

Re: Totes Graffitti Gear.

DEAR MR. PETERSON:

This is in response to your letter of July 11, 1989, on behalf of your client, Totes, Incorporated, in which you requested Headquarters reconsideration of New York Ruling Letter (NYRL) 840860 of May 23, 1989, regarding the tariff classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of Totes' "Graffiti Gear." A

meeting with members of my staff was held on November 11, 1989, in which you reiterated your client's position. Your submission of January 2, 1990, again outlined your client's views, but added no new information relevant to the classification decision.

Facts:

The subject merchandise, described as a "Graffiti Gear" drawing set, is stated to consist of the following four items, although only three items (the jacket, markers, and an idea/instruction poster) were provided to Headquarters as samples: (1) a white jacket made of 100% nonwoven spunbonded "Tyvec" (or Tyvek) olefin material, it has a zippered front opening, a high collar, long sleeves and elastic at the end of each sleeve and the bottom of the jacket to hold it snugly against the wearer's body; (2) a set of water-based, washable felt tipped markers in varying colors with plastic container; (3) a plastic stencil featuring alphabetical, numerical, and symbolic patterns intended to be used to draw on the jacket at the user's discretion; and (4) a cardboard shield/blotter, which is to be used as a protective surface during drawing on the jacket. The Tyvec jacket is a product of Taiwan; the markers will be products of Italy, or some other source country to be determined, and the stencil and blotter will be from England, or some other source country to be determined.

The importer states that the subject merchandise is a unique "drawing toy designed for the amusement of children and teenagers." Consistent with this view, the importer asserts that the subject "Graffiti Gear" is classifiable, pursuant to GRI 1, under subheading 9503.70.8000, HTSUSA, the provision for other toys, put up in sets or outfits, other. In support of this position, the importer argues that the play aspect of the item bears on its identity as a toy. The importer further states, in the original submission at page 8, that "the primary function of the toy ["Graffiti Gear"] is that of drawing, an activity intended for the amusement of the user." Implicit in the importer's position is the assertion that this item should be considered a toy.

NYRL 840860 referred to the subject merchandise as a set, and stated that the essential character of the merchandise was imparted to it by the jacket. Therefore, NYRL 840860 classified the subject "Graffiti Gear" item under subheading 6210.10.4020, HTSUSA, the provision which covers the "Tyvec" jacket.

Issues:

(1) Whether the subject "Graffiti Gear" item is considered an "other toy put up in sets," consistent with items normally classified under subheading 9503.70, HTSUSA.

(2) Whether, for tariff purposes, the "Graffiti Gear" item is considered a set.

(3) How the "Graffiti Gear" product is classified.

Law and Analysis:

The General Rules for the Interpretation of the Harmonized System (GRI's) govern classification under the Harmonized Tariff Schedule. According to GRI 1, the primary consideration in determining whether merchandise should be classified in a heading should be given to the language of the heading and any relevant chapter or section notes, and, provided such headings or notes do not otherwise require, according to the remaining GRI's, taken in order.

Here, the first question to be considered is whether a single heading exists which covers the subject "Graffiti Gear" article (hereinafter Graffiti Gear). The importer argues that subheading 9503.70, HTSUSA, covers the subject merchandise. In support of this position, the importer refers to the Explanatory Notes to the HTSUSA, which constitute the official interpretation of the tariff at the international level and cites the following language from Explanatory Note 95.03, at p. 1588:

Collections of articles, the individual items of which if presented separately would be classified in other headings in the Nomenclature, are classified in this Chapter when they are put up in a form clearly indicating their use as toys (e.g., instructional toys such as chemistry, sewing, etc., sets). The part of the Explanatory Notes that the importer omitted from the discussion is equally, if not more important to this case, than the language set forth above. The language from the Explanatory Notes which counsel did not refer to concerns items that are excluded from Heading 9503. The continuation of Explanatory Note 95.03, states, at p. 1589:

This heading also excludes:

(a) Paints put up for children's use (heading 32.13).
(b) Modelling pastes put up for children's amusement (heading 34.07).
(c) Children's picture, drawing or colouring books of heading 49.03.

(d) Transfers (heading 49.08) * * *.
(h) Crayons and pastels for children's use, of heading 96.09.
(ij) Slates and blackboards, of heading 96.10.

The items described above are expressly excluded by the Explanatory Notes from the "other toy" provision. The items listed above, particularly (a), (c), (h) and (ij), have primarily a drawing and craft function. Although they may tend to amuse those who use them, such amusement is incidental to their primary purpose. Graffiti Gear's component parts, especially the markers, are more akin to the items specifically excluded by the Explanatory Notes to Heading 9503 than those included therein. Furthermore, we do not consider Graffiti Gear to be an instructional toy similar to the exemplars described in the Explanatory Notes (chemistry or sewing sets). Accordingly, it is Customs' position that Graffiti Gear is not classifiable in subheading 9503.70.8000, HTSUSA, the provision for other toys, put up in sets, other. No heading, by itself, covers the subject merchandise as packaged. Because the three components of the Graffiti Gear product are classifiable under three seperate headings, we must determine whether the product is a set to be classified in accordance with the principles of GRI 3. The Explanatory Notes to GRI 3(b) set forth guidelines in determining what constitutes a "set". The relevant note states, in part:

(X) For the purposes of this Rule, the term "goods put up in sets for retail sale" shall be taken to mean goods which:

(a) consist of at least two different articles which are, prima facie, classifiable in different headings;

(b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and

(c) are put up in a manner suitable for sale directly to users without repacking (e.g., in boxes or cases or on boards).

In this case, at least two of the above "set" criteria are satisfied. First, the subject merchandise consists of at least two different articles which are prima facie classifiable in different headings. Secondly, the items are put up in a manner suitable for sale directly to consumers without repacking. The third criterion, that the goods consist of articles put up together to meet a particular need or carry out a specific activity, does not appear to be satisfied. The markers are used for drawing. The jacket, although intended to be written upon by the purchaser, does not exclusively serve that function. It is not simply a medium for the other components of the Graffiti Gear package. Although flimsy, the jacket functions as a jacket with or without the designs. Decorated or not, the jacket can be worn. The activity of drawing is unrelated to the function of the jacket.

Marketing and packaging information depicts children and teenagers wearing their decorated Graffiti Gear jackets, as well as decorating them. These activities are distinct so as to eliminate these items, even if packaged together, from being considered a set. Information obtained through sources other than the importer, indicate that a variety of accessory packs which contain squeeze paint, sparkle paint, fluorescent markers and other items for use in decorating the jackets are marketed separately. This fact further confirms Customs view as to the distinct nature of the graffiti gear components and their failure to satisfy the set requirements of GRI 3(b). Accordingly, the subject merchandise is not considered to be a set in accordance with the guidelines in the Explanatory Notes to GRI 3(b). Rather, each item is classifiable separately under GRI 1.

Holding:

The Graffiti Gear jacket is classifiable in subheading 6210.10.4025, HTSUSA, which provides for garments, made up of fabrics of heading 5602, 5603, 5903, 5906 or 5907, other, other. Items classified under this subheading are subject to a duty rate of 17 percent ad valorem. The jacket falls within textile category designation 659. As a product of Taiwan this merchandise will be subject to the requirement of visa and quota restraints based upon international textile trade agreements. The applicable subheading for the markers is 9608.20.0000, HTSUSA, which provides for felt tipped and other porous-tipped pens and markers. Items classified under this provision are subject to a duty rate of 8 percent ad valorem.

The color "Idea Poster" and instruction sheet is classifiable under subheading 4911.99.6000, the provision for other printed matter, other, printed on paper in whole or in part by lithographic process. Items classified under this provision are subject to a duty rate of 0.4 percent ad valorem. None of the samples presented to Headquarters by the importer's counsel contained the plastic stencil or the cardboard shield/blotter. Nor did the packaging indicate that the two items were even included in the Graffiti Gear kit. Without

samples of these items, we are unable to provide a definitive classification of the plastic stencil and blotter. If the importer intends to include these items in the Graffiti Gear package, then samples should be provided, and a ruling on those specific items should be requested.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the Status Report On Current Import Quotas (Restraint Levels), an issuance of the U.S. Customs Service, which is updated weekly and is available at your local Customs office. Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the textile restraint (quota/visa) categories, you should contact your local customs office prior to importing the merchandise to determine the current applicability of any import restraints or requirements.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
New York, NY, September 25, 1998.

CLA-2-32:RR:NC:2:236 D81180
Category: Classification
Tariff No. 3213.10.0000, 4823.90.6500, 6213.10.1000, 6214.10.1000, 6304.99.6030, 7326.90.8585, and 9603.30.6000

MS. CAROLYN HALL
FRITZ COMPANIES, INC.
1000 Port Carteret Drive
Carteret, NJ 07008

Re: The tariff classification of Color Me Silk Passepartout, Color Me Silk Scarf, Color Me Silk Tie and Color Me Silk Window Decorations from Switzerland.

DEAR MS. HALL:

In your letter dated August 5, 1998, on behalf of your client Arty's Inc., you requested a tariff classification ruling.

The samples submitted, Color Me Silk Passepartout, Color Me Silk Scarf, Color Me Silk Tie and Color Me Silk Window Decorations, consist of several items. For Customs purposes, the above samples are not sets and the items contained therein will be classified separately.

The applicable subheading for the Silkcolor Paint Bottles will be 3213.10.0000, Harmonized Tariff Schedule of the United States, which provides for Artists', students' or signboard painters' colors, modifying tints, amusement colors and the like, in tablets, tubes jars, bottles, pans or in similar forms or packings: Color in sets. The rate of duty will be 6.5 percent ad valorem.

The applicable subheading for the Tri-Fix will be 4823.90.6500, Harmonized Tariff Schedule of the United States, which provides for Other paper, paperboard, cellulose wadding and webs of cellulose fibers, cut to size or shape; other articles of paper pulp, paperboard, cellulose wadding or webs of cellulose fibers: Other: Other: Other: Of coated paper or paperboard: Other. The rate of duty will be 3.4 percent ad valorem.

The applicable subheading for the Silk Handkerchiefs (woven) will be 6213.10.1000, Harmonized Tariff Schedule of the United States, which provides for Handkerchiefs: Of silk or silk waste: Containing 70 percent or more by weight of silk or silk waste. The rate of duty will be 4.9 percent ad valorem.

The applicable subheading for the Silk Scarf (woven) will be 6214.10.1000, Harmonized Tariff Schedule of the United States, which provides for Shawls, scarves, mufflers, mantillas, veils and the like: Of silk or silk waste: Containing 70 percent or more by weight of silk or silk waste. The rate of duty will be 2.5 percent ad valorem.

The applicable subheading for the Silk Window Decorations will be 6304.99.6030, Harmonized Tariff Schedule of the United States, which provides for Other furnishing articles, excluding those of heading 9404: Other: Not knitted or crocheted, of other textile materials: Other: Other: Other: Containing 85 percent of more by weight of silk or silk waste. The rate of duty will be 5.1 percent ad valorem.

The applicable subheading for the Pins will be 7326.90.8585, Harmonized Tariff Schedule of the United States, which provides for Other articles of iron or steel: Other: Other: Other: Other. The rate of duty will be 3.5 percent ad valorem.

The applicable subheading for the Brush will be 9603.30.6000, Harmonized Tariff Schedule of the United States, which provides for Artists' brushes, writing brushes and similar brushes for the application of cosmetics: Valued over 10 cents each. The rate of duty will be 0.6 percent ad valorem.

The plastic palette is considered to be part of packing. Packing costs are prorated to each of the above items accordingly.

We are unable to classify the silk tie (woven) with the limited information provided. Should you wish to obtain a binding ruling on this merchandise, please provide the following information:

1) The percentage by weight of the linings and interlinings?
2) The fabric content of the linings and interlinings?

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist V. Gualario at 212–466–5744.

ROBERT B. SWIERUPSKI,
National Commodity Specialist Division.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:TE 963475 gah
Category: Classification
Tariff No. 6210.10.9040

MR. JOHN PETERSON
NEVILLE, PETERSON & WILLIAMS
80 Broad Street, Suite 3400
New York, NY 10004

Re: Modification of 085267, classification of a jacket, markers, and instructional poster and sheet.

DEAR MR. PETERSON:

This is in regard to Headquarters Ruling (HQ) 085267 that was issued to you on May 9, 1990, which addressed the tariff classification of Totes Graffiti Gear under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). We have reviewed this ruling in light of HQ 962355, dated and have determined that HQ 085267 is incorrect. Therefore, this ruling revokes HQ 085267 and sets forth the correct classification for the drawing set.

Facts:

The merchandise is described as a "Graffiti Gear" drawing set, and consists of the following four items: (1) a white jacket made of 100% nonwoven spunbonded "Tyvec" (or Tyvek)

olefin material, it has a zippered front opening, a high collar, long sleeves and elastic at the end of each sleeve and the bottom of the jacket to hold it snugly against the wearer's body; (2) a set of water-based, washable felt tipped markers in varying colors with plastic container; (3) a plastic stencil featuring alphabetical, numerical, and symbolic patterns intended to be used to draw on the jacket at the user's discretion; and (4) a cardboard shield/blotter, which is to be used as a protective surface during drawing on the jacket. The Tyvec jacket is a product of Taiwan; the markers will be products of Italy, or some other source country to be determined, and the stencil and blotter will be from England, or some other source country to be determined.

In HQ 085267, dated May 9, 1990, Customs held, among other things, that the articles of the set were separately classified. Our reasoning was that the separate articles, although useable together, could also be used for separate activities or needs, and therefore did not meet criteria (b) of the GRI 3(b) Explanatory Note of put up to meet a particular need or specific activity.

Issue:

Is the Graffiti Gear kit a set put up for retail sale?

Law and Analysis:

Classification of merchandise under the Harmonized Tariff Schedule of the United States (HTSUS) is in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI.

Heading 6210 covers garments made up of fabrics of heading 5602, 5603, 5906 or 5907. The jacket is classified therein. Heading 9608 covers, among other things, felt tipped and other porous-tipped pens and markers. The markers are classified therein. Heading 4911 covers other printed matter, including printed pictures and photographs. The instructional poster and sheet are classified therein.

In HQ 962355, we considered whether or not a kit of paints and, e.g., a silk tie and handkerchief, accompanied by instructional literature, and a paint brush, among other accessories, constituted a set put up for retail sale.

GRI 3(a) indicates that when goods are classifiable in more than one heading, headings which refer to part only of the items put up for retail sale, the headings are to be regarded as equally specific.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. While not legally binding, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

The EN to GRI 3(b) states that to meet the criteria of a set put up together for retail sale, articles must:

> (a) consist of at least two different articles which are, *prima facie*, classifiable in different headings.
>
> (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
>
> (c) are put up in a manner suitable for sale directly to users without repacking (e.g., in boxes or cases or on boards).

Applying the above GRI 3(b) EN criteria, the goods in HQ 962355 were several different goods classifiable in different headings. Criteria (a). The goods were put up together to carry out the specific activity of painting a craft project. Criteria (b). The reasoning as to sets criteria set forth in NY D81180 and HQ 085267 is specifically revoked. A set may be put up together to meet a particular need or carry out a specific activity, such as painting a decorated article of clothing, and yet be capable of disassembly into articles useful for other purposes. The examples of sets described in EN (X)(1–3) to GRI 3(b) are also illustrative of this point. The focus in criteria (b) is whether they work together to meet a need or carry out an activity, not whether that is all they are capable of doing. They are put up in a manner suitable for sale directly to users without repacking in cardboard box frames. Thus, in HQ 962355, the craft sets met criteria (a–c), of the GRI 3(b) EN, and therefore were found to be sets put up for retail sale. In the instant case, the drawing set meets the GRI 3(b) EN criteria in the same way.

To be classified at GRI 3(b), the set must be classifiable as if the set consisted of the one article which gives the whole its essential character, insofar as this criterion is applicable. The Explanatory Notes indicate that the characteristic which gives the set its essential character may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value or by the role of a constituent material in relation to the use of the goods.

In the instant case, the nature of the jacket and the role of it in relation to the use of the goods, both favor a finding that it provides the essential character to the set. The painted jacket can be worn many times, and new designs added to it over time. Thus, we find that the jacket provides the essential character to the set, and the set is classified accordingly. While we revoke the reasoning and result as to GRI 3(b) analysis in HQ 085267, we affirm the analysis and finding that the drawing set is not an other toy, put up in sets or outfits, of subheading 9503.70, HTSUS. For your information, you may wish to read *Classification of Sets under the HTS*, an informed compliance publication of the U.S. Customs Service, dated September 1999, available at www.customs.gov. *See also*, HQ 961956, dated October 8, 1999.

Holding:

The Graffiti Gear set is classifiable in subheading 6210.10.9040, HTSUSA, which provides for garments, made up of fabrics of heading 5602, 5603, 5903, 5906 or 5907, of fabrics of heading 5602 or 5603, other, other, other, other. Items classified under this subheading are subject to a duty rate of 16.5 percent ad valorem. The jacket falls within textile category 659. HQ 085267 is hereby modified.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent negotiations and changes, we suggest that your client check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an issuance of the U.S. Customs Service, which is updated weekly and is available at the local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact the local Customs office prior to importing the merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:TE 962355 gah
Category: Classification
Tariff No. 4817.20.4000, 6214.10.1000,
6215.10.0025, and 6304.99.6030

FRED C. HIGDON
DIRECTOR, REGULATORY COMPLIANCE
FRITZ COMPANIES, INC.
706 Mission Street, Suite 1000
San Francisco, CA 94103

Re: Reconsideration of NY D81180; paints and silk tie, or silk scarf, or note cards or window decorations, put up for retail sale as a craft project

DEAR MR. HIGDON:

This is in reply to your request for reconsideration of NY ruling D81180, dated September 25, 1998, on craft projects containing paints put up in small bottles for use on a silk tie

and pocket square, a silk scarf, silk window decorations, or silk mounted on paper note cards. A sample set was provided.

Facts:

The items at issue are entitled *Color Me* Silk Passepartout (all occasion note cards), *Color Me* Silk Scarf, *Color Me* Silk Tie and *Color Me* Silk Window Decorations. The sets include: paints for silk; an artist's paint brush, instruction booklets; pins; a plastic palette; silk test fabric (about five inches square), folded cardboard frames; and depending on the set, a tie and handkerchief, a scarf, three note cards with envelopes or three window decorations. Each article is made from white woven silk fabric printed with gold colored guidelines of the pattern to be painted. All articles are packaged in cardboard box frames indicating how the project is completed.

In NY D81180, Customs held the articles of each set were separately classified, following HQ 085267, dated May 9, 1990. Our reasoning was that the separate articles, although useable together, could also be used for separate activities or needs, and therefore did not meet criteria (b) of the GRI 3(b) Explanatory Note of put up to meet a particular need or specific activity.

Issue:

Are the craft projects considered sets put up for retail sale?

Law and Analysis:

Classification of merchandise under the Harmonized Tariff Schedule of the United States (HTSUS) is in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI.

Heading 3213, Harmonized Tariff Schedule of the United States (HTSUS), provides for, artists', students' or signboard painters' colors, modifying tints, amusement colors and the like, in tablets, tubes, jars, bottles, pans or in similar forms or packings. The silk paint in jars are classified therein. Heading 4817 provides for, inter alia, envelopes, letter cards, plain postcards and correspondence cards, of paper or paperboard. The note cards and envelopes are classified therein. Heading 6213 covers handkerchiefs. The pocket square is classified therein. Heading 6214 covers, inter alia, scarves. The scarf is classified therein. Heading 6304 covers other furnishing articles, excluding those of heading 9404. The window decorations are classified therein.

Heading 4823 provides for, inter alia, other articles of paper pulp, paper, paperboard, cellulose wadding and webs of cellulose fibers. The folded cardboard frames are classified therein. Heading 4901 covers printed books, brochures, leaflets, and similar printed matter. The instruction booklet is classified therein. Heading 5007 covers woven fabrics of silk or of silk waste. The silk fabric test swatch with chain stitched raw edges is classified therein. Heading 7326 covers other articles of iron or steel. The pushpins are classified therein. Heading 9603 covers, inter alia, brushes. The paint brush is classified therein. The plastic palette and cardboard box frames are considered GRI 5(b) packing materials.

You argue that the craft projects form sets put up for retail sale, and that the reasoning in 085267, dated May 9, 1999, is contrary to the notion that an art or craft purpose is a specific activity. GRI 3(a) indicates that when goods are classifiable in more than one heading, headings which refer to part only of the items put up for retail sale, the headings are to be regarded as equally specific.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. While not legally binding, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

The EN to GRI 3(b) states that to meet the criteria of a set put up together for retail sale, articles must:

> (a) consist of at least two different articles which are, *prima facie*, classifiable in different headings.
>
> (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
>
> (c) are put up in a manner suitable for sale directly to users without repacking (e.g., in boxes or cases or on boards).

Applying the above GRI 3(b) EN criteria, the instant goods are several different goods classifiable in different headings. Criteria (a). The goods are put up together to carry out the specific activity of painting a craft project. Criteria (b). The reasoning as to sets criteria (b) set forth in NY D81180 and HQ 085267 is specifically revoked. A set may be put up together to meet a particular need or carry out a specific activity, such as painting a decorated article of clothing, and yet be capable of disassembly into articles useful for other purposes. The examples of sets described in EN (X)(1–3) to GRI 3(b) are also illustrative of this point. The focus in criteria (b) is whether they work together to meet a need or carry out an activity, not whether that is all they are capable of doing.

They are put up in a manner suitable for sale directly to users without repacking in cardboard box frames. Under the instant facts, the craft sets meet criteria (a–c), of the GRI 3(b) EN, and therefore form sets put up for retail sale. For your information, you may wish to read *Classification of Sets under the HTS*, an informed compliance publication of the U.S. Customs Service, dated September 1999, available at www.customs.gov.

To be classified at GRI 3(b), the set must be classifiable as if the set consisted of the one article which gives the whole its essential character, insofar as this criterion is applicable. The Explanatory Notes indicate that the characteristic which gives the set its essential character may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value or by the role of a constituent material in relation to the use of the goods.

You have submitted a value breakdown of all the articles in each of the four sets, showing that the paints are the article of greatest value in each set, by a slim margin. You argue that the paints provide the essential character to the set. Your reasoning is that painting is the essence of the activity, not the creation of the finished article. Indeed, we have ruled that amusement colors for children are classified in 3213.10 when put up in sets with certain articles to be painted. *See, e.g.,* NY B83100, dated April 14, 1997.

However, the nature of the tie or scarf, for example, and the role of it in relation to the use of the goods, both favor a finding of an essential character in the finished, painted article. The articles in question are well constructed silk articles with gold outlines of the motif to be painted, and are painted to demonstrate serious artistic talent by an adult, often as a gift to another. The paints are used up, and the finished tie and handkerchief, scarf, note card or window decoration remain, to be used over and over again. Thus, we find that the tie, the scarf, the note card and the window decoration provide the essential character to the sets. The sets are classified accordingly.

In the case of the *Color Me* Silk Tie set, the set contains both a silk tie and a small silk handkerchief or pocket square. We believe the tie provides the essential character as between the two competing headings, 6213 and 6214, HTSUS, as it provides more of the bulk, weight and value of the set.

Holding:

The *Color Me* Silk Passepartout set is classified in subheading 4817.20.4000, HTSUS, which provides for letter cards, plain postcards and correspondence cards, other, dutiable at 1.6 percent ad valorem. The *Color Me* Silk Scarf set is classified in subheading 6214.10.1000, HTSUS, which provides for shawls, scarves, mufflers, matillas, veils and the like, of silk or silk waste, containing 70 percent or more by weight of silk or silk waste, dutiable at 1.2 percent ad valorem. The *Color Me* Silk Tie set is classified in subheading 6215.10.0025, HTSUS, which provides for ties, bow ties and cravats, of silk or silk waste, containing 50 percent or more by weight (including any linings and interlinings) of textile materials other than silk or silk waste, dutiable at 7.6 percent ad valorem and carrying textile category 659. The *Color Me* Silk Window Decorations set is classified in subheading 6304.99.6030, HTSUS, which provides for other furnishing articles, other, not knitted or crocheted, of other textile materials, other, other, containing 85 percent or more by weight of silk or silk waste, dutiable at 4.8 percent ad valorem. NY D81180 is hereby revoked.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent negotiations and changes, we suggest that your client check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an issuance of the U.S. Customs Service, which is updated weekly and is available at the local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact the local

Customs office prior to importing the merchandise to determine the current status of any import restraints or requirements. See also, HQ 961956, dated October 8, 1999.

JOHN DURANT,
Director,
Commercial Rulings Division.

MODIFICATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE CLASSIFICATION OF A WOMEN'S KNIT GARMENT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of classification ruling letter and revocation of treatment relating to the classification of a women's knit garment.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), this notice advises interested parties that Customs is modifying a ruling letter pertaining to the tariff classification of a women's knit garment and revoking any treatment previously accorded by Customs to substantially identical transactions. Notice of the proposed modification was published in the CUSTOMS BULLETIN of October 13, 1999, Vol. 33, No. 41. No comments were received.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after January 31, 2000.

FOR FURTHER INFORMATION CONTACT: Josephine Baiamonte, Textile Branch, (202) 927–2394.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. §1484) the importer of record is respon-

sible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

In NY D84994, dated December 16, 1998, the classification of a women's knit garment was determined to be in heading 6114, HTSUS. Since the issuance of this ruling, Customs has had a chance to review the classification of this merchandise and has determined that the classification is in error.

Customs, pursuant to 19 U.S.C. 1625(c)(1), is modifying NY D84994, and any other rulings not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letter (HQ) 963414 (*see* "Attachment" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical transactions.

As stated in the proposed notice, this modification will cover any rulings on this issue which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the issue subject to this notice, should have advised Customs during the notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, have been the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations involving the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Dated: November 15, 1999.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, November 15, 1999.

CLA-2 RR:CR:TE 963414 jb
Category: Classification
Tariff No. 6104.62.2030

MR. JOHN IMBROGUGLIO
NORDSTROM, INC.
A/P IMPORT OFFICE
1617 Sixth Avenue, Suite No. 1000
Seattle, WA, 98101–1742

Re: Modification of NY D84994; classification of women's knit garment.

DEAR MR. IMBROGUGLIO:

On December 16, 1998, our New York office issued to you New York Ruling Letter (NY) D84994, regarding the tariff classification under the Harmonized Tariff Schedule of the United States (HTSUS), for certain women's knit lower body garments. This letter is to inform you that although the classification determinations rendered in that ruling are correct as pertains to styles 4120 and 3220, the classification of style 4132 is in error. Accordingly, the classification of style 4132 is changed pursuant to the analysis which follows below.

Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), notice of the proposed modification of NY D84994 was published on October 13, 1999, in the CUSTOMS BULLETIN, Volume 33 , Number 41. No comments were received.

Facts:

The merchandise at issue, referenced style number 4132, consists of a lady's knitted lower body garment which is composed of 90 percent cotton and 10 percent spandex fabric. The garment features a four panel construction and measures 12½ inches in length, with each leg opening measuring 9¼ inches. The shorts are a pull-on style with a one inch wide covered elasticized waistband and hemmed leg openings.

NY D84994, determined that the classification of style number 4132 was in heading 6114, HTSUS, as an "other garment." Upon review of that merchandise it is our determination that the subject merchandise is properly classified in heading 6104, HTSUS, as women's outerwear shorts.

Issue:

What is the proper classification for the subject merchandise?

Law and Analysis:

Classification of merchandise under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation (GRI's). GRI 1 requires that classification be determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI.

There are three plausible tariff classification provisions for the subject merchandise, that is, heading 6108, HTSUS, which provides for, among other things, women's underpants, heading 6114, which provides for, among other things, other women's knit garments, and heading 6104, HTSUS, which provides for, among other things, women's shorts. In classifying the subject merchandise, which could be considered to have features attributable to one of the above stated types of garments, consideration of marketing information, and the design and construction details of the garment are instructive in determining whether or not it will be principally used as underwear. In the case of the subject garment no marketing information was submitted to corroborate the claim that this garment is intended to be worn as underwear. As such, we look to the garment itself as the best evidence for characteristic features indicative of the proper classification.

The submitted garment provides sufficient coverage of the lower torso extending down to the legs, and the weight of the fabric is such that it is adequate for an outerwear classification. Furthermore, unlike women's underwear garments, which traditionally feature a gusset and cotton lining in the crotch, these features are absent in the subject garment.

The center seam and inseam are also not sewn down flat. Rather, they are finished with an overcast seam finish, and the seam allowance is trimmed, all of which would cause irritation if worn next to the skin. These features would render the garment extremely uncomfortable and ill-suited for use as underwear. *See, e.g.*, HQ 951205, dated June 16, 1992, and HQ 962356, published in the CUSTOMS BULLETIN, dated September 22, 1999, Vol. 33, Number 38.

Heading 6104 covers, *inter alia*, shorts. This provision is an *eo nomine* provision with no legal note defining or limiting the scope of the term shorts. The Explanatory Notes to the Harmonized Commodity Description and Coding System (EN) to heading 6104, HTSUS, by reference to the previous heading, state that shorts are trousers which do not cover the knee, and that trousers envelop each leg separately. We interpret this guidance to encompass any amount of leg coverage as long as it ends above the knee as sufficient to specifically describe a garment as shorts. As such, it is our determination that the subject garment is properly classified in heading 6104, HTSUS.

Heading 6114, HTSUS, provides for knit garments which are not more specifically provided for in previous headings. As we have already determined that the subject garment is more specifically provided for in heading 6104, HTSUS, there is no need to discuss this classification.

Accordingly, the determination in NY D84994 is modified pursuant to the analysis set forth in this ruling letter.

Holding:

The subject lower body garment is classified in subheading 6104.62.2030, which provides for women's or girls' suits, ensembles, suit-type jackets, blazers, dresses, skirts, divided skirts, trousers, bib and brace overalls, breeches and shorts (other than swimwear), knitted or crocheted: trousers, bib and brace overalls, breeches and shorts: of cotton: other: shorts: women's. The applicable column one general rate of duty is 15.8 percent ad valorem and the textile category is 348.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent negotiations and changes, we suggest that you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an issuance of the U.S. Customs Service, which is updated weekly and is available at the local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact the local Customs office prior to importing the merchandise to determine the current status of any import restraints or requirements.

NY D84994 dated December 16, 1998, is hereby modified in accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

MODIFICATION OF CUSTOMS RULING LETTER AND TREATMENT CONCERNING THE ELIGIBILITY OF STEAM SET SOCKS FOR DUTY-FREE TREATMENT AS AMERICAN GOODS RETURNED

AGENCY: U.S. Customs Service, Department of Treasury.

ACTION: Notice of modification of a tariff classification ruling letter and the treatment relating to the duty-free eligibility of U.S. origin socks which are steam set abroad and returned to the U.S.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling letter concerning the eligibility of U.S. origin socks which are steamed set abroad for duty-free treatment as American goods returned under subheading 9801.00.10, of the Harmonized Tariff Schedule of the United States and any treatment previously accorded by the Customs Service to substantially identical transactions. Notice of the proposed revocation was published on October 6, 1999, in the CUSTOMS BULLETIN, Vol. 33, No 40.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after January 31, 2000.

FOR FURTHER INFORMATION CONTACT: Robert Dinerstein, Special Classification and Marking Branch, Office of Regulations and Rulings (202) 927–1454.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI") became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility". These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's rights and responsibilities under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484J) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to

properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), a notice was published on October 6, 1999 in the CUSTOMS BULLETIN, Volume 33, Number 40, proposing to modify NY E82318 dated May 21, 1999, concerning the duty-free eligibility of U.S. origin socks which are steam set abroad. This ruling held that U.S. origin socks which are steamed set in Mexico to flatten them and set their size are eligible for a duty exception as American goods returned pursuant to subheading 9801.00.10, Harmonize Tariff Schedule of the United States, (HTSUS).

One comment was received in response to this notice. The commenter represents clients who import U.S.-origin socks which have been "wetted and boarded" abroad and maintains that these operations should not preclude the socks from the receiving duty-free treatment under subheading 9801.00.10, HTSUS. in scenario described by the commenter, socks knit in the U.S. are baled for shipment abroad. The baling causes the socks to become wrinkled; therefore, after they arrive overseas, they are "wetted and boarded" prior to packaging. The wetting process involves moistening the socks by placing them into a tub, spraying them with water, then moderately drying them so that they are pliable enough for boarding. The boarding process involves placing the slightly moistened sock onto a foot-shaped metal form, which revolves through a heated chamber to dry the article and remove wrinkles. According to the commenter, the boarding does not shape the sock because the shape of the socks is determined by the U.S. knitting process. The boarding "sets the shape of the sock for packaging and retail presentation purposes only."

The commenter contends that the wetting and boarding operations do not improve the socks in condition or advance them in value. It is pointed out that the wetting operation is performed merely to allow the socks to become pliable enough to be boarded. The commenter also states that removing wrinkles from the socks gives them a smooth appearance which "eases the packaging process." Thus, it is contended that the wetting and boarding of the socks are part of the foreign packaging operation.

The operations described in the comment, while somewhat similar to the steam-setting operation described in NY E82318, clearly are not identical to the operation under consideration here. The steam-setting operation is performed to flatten the socks as to remove the "hollow tube" look to the articles and also to fix the size of the socks. Nevertheless, in general, Customs believes that operations which serve to remove wrinkles, flatten and/or set the size of the socks are performed to enhance the appearance of the merchandise, and hence their marketability, which clearly results in an improvement in the condition of the articles and an advancement in their value, contrary to the specific wording of subheading 9801.00.10, HTSUS.

As stated in the proposed notice, this modification will cover any ruling on this issue which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the issue subject to this notice should have advised Customs during the notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs is modifying any treatment previously accorded by Customs to Substantially identical transactions. This treatment may among other reasons have been the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations involving the same or similar merchandise, or the importer's or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Customs pursuant to 19U.S.C. 1625(c)(1) is modifying NY E82318 and modifying any other ruling not specifically identified, to reflect the proper classification of the socks pursuant to the analysis set forth in Headquarters Ruling Letter (HRL) 561490 (see the "Attachment" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is modifying any treatment previously accorded by Customs to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

Dated: November 22, 1999.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC, November 22, 1999.

CLA–02 RR:CR:SM 561490 RSD
Category: Classification
Tariff No. 9801.00.10 and 9802.00.50

MR./MS. WAN J. CHOI
ROYAL PALM CORPORATION
2325 Raymer Avenue
Fullerton, CA 92833

Re: Modification of NY E82318; Eligibility of socks for the duty exemption under 9801.00.10, HTSUS; American goods returned; alterations.

DEAR MR./MS. CHOI:

This is in regard to NY (New York Ruling Letter) E82318 that was issued to you on May 21, 1999, addressing the country of origin marking of socks and the eligibility of the merchandise to enter free of duty as American goods returned under subheading 9801.00.10 Harmonized Tariff Schedule of United States (HTSUS). We have reviewed this ruling and have determined that NY ruling letter E82318 is incorrect with regard to the issue of eligibility under subheading 9801.00.10, HTSUS. Therefore, this ruling modifies NY E82318 and sets forth the correct duty treatment for the socks.

Facts:

The merchandise in question consists of knits socks made from cotton or nylon yarn of U.S. or foreign origin. The yarns are knit into socks in the United States where the stitching for the toe closing is also performed. The socks are then shipped to Mexico where they are steam set to flatten and fix size, affixed with clips in cuff and toe, banded together in bundles of 1–2 dozen, packed in polybags or inner boxes and then packed into shipping cases or cartons for shipment back to the U.S.

Issue:

Whether the imported socks are eligible for duty-free treatment pursuant to subheading 9801.00.10 or 9802.00.50, HTSUS.

Law and Analysis:

Subheading 9801.00.10, HTSUS, provides for the free entry of products of the U.S. that have been exported and returned without having been advanced in value or improved in condition by any process of manufacture or other means while abroad, provided the documentary requirements of section 10.1, Customs Regulations, are satisfied. While some change in the condition of the product while it is abroad is permissible, operations which either advanced the value or improved the condition of the exported product render it ineligible for duty-free entry upon return to the U.S. *Border Brokerage Company, Inc. v United States*, 314 F. Supp. 788 (1970), *appeal dismissed*, 58 CCPA 165 (1970).

The Pertinent documents required by 19 CFR § 10.1 are a declaration from the foreign shipper that the articles were exported from the U.S. and that they are returned without having been advanced in value or imported in condition, and a declaration from the owner, importer, consignee, or agent that the articles were manufactured in the U.S. and that the articles were exported from the U.S. without benefit of drawback.

In this instance, the socks are steam set in Mexico to flatten them so as to remove the "hollow tube" look and also to fix their size. Customs has previously indicated that the pressing abroad of U.S.-origin jeans would disqualify the merchandise from duty-free entry under subheading 9801.00.10 because such an operation constitutes an advancement in value and an improvement in condition. *See* HRL (Headquarters Ruling Letter) 557600, dated February 24, 1994. Accordingly, because steam setting is similar to pressing, we find that the socks are advanced in value and improved in condition and therefore, are ineligible for duty-free entry as American goods returned under subheading 9801.00.10, HTSUS.

However, we note that the socks which are steam set in Mexico may qualify for a duty exemption under subheading 9802,00.50, HTSUS, when they are returned to the U.S. Under subheading 9802.00.50, HTSUS, articles returned to the U.S., after having been exported to be advanced in value or improved in condition abroad by repairs or alterations

may qualify for a duty exemption provided the foreign operation does not destroy the identity of the exported articles or create new or commercially different articles through a process of manufacture. *See A.F. Burstrom v. United States*, 44 CCPA 27, C.A.D. 631 (1956), aff'g C.D. 1752, 36 Cust. Ct. 46 (1956); *Guardian Industries Corp. v. United States*, 3 CIT 9 (1982). Accordingly, entitlement to this tariff treatment is precluded where the exported where the exported articles are incomplete for their intended purpose prior to the foreign process. *Dolliff & Company, Inc. v. United States*, 455 F. Supp. 618 (CIT 1978), *aff'd*, 599 F.2d 1015 (Fed. Cir. 1979). Articles repaired or altered in Mexico are entitled to duty-free treatment under this tariff provision, provided the documentary requirements of section 181.64, Customs Regulations, (19 CFR 181.64) are met. In Headquarters Ruling Letter (HRL) 557600, February 24, 1994, Customs held that washing, pressing, stapling, and tack stitching operations performed on jeans in Mexico constitute "alterations", thereby qualifying the jeans for the full duty exemption under subheading 9802.00.50, HTSUS, when returned to the U.S. origin socks in Mexico constitutes an alteration, and thus they are eligible for duty-free treatment under subheading 9802.00.50, HTSUS, when returned to the U.S., provided the documentary requirements of section 181.64 are met.

Holding:

The imported socks are ineligible for duty-free treatment as American goods returned under subheading 9801.00.10, HTSUS. NY E82318, dated May 21, 1999, is modified accordingly. The steam setting of the socks constitutes an alteration and thus they are eligible for a duty exemption under subheading 9802.00.50, HTSUS, when returned to the U.S.

NY E82318 dated May 21, 1999, is hereby modified. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the Customs Bulletin.

JOHN DURANT,
Director,
Commercial Rulings Division.

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 141

RIN 1515–AC15

ANTICOUNTERFEITING CONSUMER PROTECTION ACT: CUSTOMS ENTRY DOCUMENTATION

AGENCY: Customs Service, Treasury.

ACTION: Notice of proposed rulemaking; extension of comment period.

SUMMARY: This document provides an additional 30 days for interested members of the public to submit comments on the proposal to amend the Customs Regulations to implement section 12 of the Anticounterfeiting Consumer Protection Act of 1996 (ACPA). Section 12 of the ACPA concerns the content of entry documentation required by Customs to determine whether imported merchandise or its packaging bears an infringing trademark. The proposed regulatory provision requires importers to provide on the invoice a listing of all trademarks appearing on the imported merchandise and its packaging. The proposal was published in the Federal Register on September 13, 1999, and the comment period was scheduled to expire on November 12, 1999.

DATES: Comments on the proposal must be received on or before December 13, 1999.

ADDRESSES: Written comments (preferably in triplicate) may be addressed to the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, Ronald Reagan Building, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20229. All comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)) between 9:00 a.m. and 4:30 p.m. on normal business days at the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1300 Pennsylvania Avenue, NW, 3rd Floor, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Lou Alfano, Commercial Enforcement, Office of Field Operations (202) 927–0005.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Customs published a document in the Federal Register (64 FR 49423) on September 13, 1999, proposing to implement section 12 of the Anti-counterfeiting Consumer Protection Act of 1996 (ACPA). Section 12 of the ACPA concerns the content of entry documentation required by Customs to determine whether imported merchandise or its packaging bears an infringing trademark. The proposed regulatory provision requires importers to provide on the invoice a listing of all trademarks appearing on the imported merchandise and its packaging.

The document invited the public to comment on the proposal. Comments on the proposed rule were requested on or before November 12, 1999.

On November 8, 1999, Customs received a request from the Customs and International Trade Bar Association to extend the comment period an additional 30 days.

Customs has determined to grant the request for the extension. Accordingly, the period of time for the submission of comments is being extended 30 days. Comments are now due on or before December 13, 1999.

Dated: November 9, 1999.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

[Published in the Federal Register, November 16, 1999 (64 FR 62135)]

19 CFR Part 24

RIN 1515–AC48

ENDORSEMENT OF CHECKS DEPOSITED BY THE U.S. CUSTOMS SERVICE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the Customs Regulations to reflect that Customs employees authorized to accept certain monetary instruments (such as checks) in payment of Customs duties, taxes, and other charges are no longer required to place their names and badge numbers on the instrument and that certain other information must be placed on the face (front) side of the instrument, rather than the reverse side of the instrument. The proposed changes are designed to avoid a conflict with Federal Reserve System regulations that govern the endorsement of checks by banks.

DATES: Comments must be received on or before January 18, 2000.

ADDRESS: Written comments (preferably in triplicate), regarding both the substantive aspects of the proposed rule and how it may be made easier to understand, may be submitted to and inspected at the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1300 Pennsylvania Avenue, N.W., 3rd Floor, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Ms. Jo Cohen, Acting Director, Financial Management Division, Office of Finance (202–927–6140).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Under § 24.1 of the Customs Regulations (19 CFR 24.1), procedures for the collection of Customs duties, taxes, and other charges and fees are set forth. Currently, under § 24.1(b), applicable to noncommercial importations at piers, terminals, bridges, airports, and other similar places, Customs employees authorized to collect payments may accept a personal check and shall ensure that certain information is recorded on the check. Under § 24.1(b)(1), with respect to personal checks received under § 24.1(b) and certain other checks and money orders received under § 24.1(a), Customs employees shall show their name, badge number, and the serial or other identification number from the collection voucher on the reverse side of the check.

Requirements applicable to banks endorsing checks are set forth under regulations of the Federal Reserve System (12 CFR 229.35). Appendix D to Part 229 of the Federal Reserve System regulations (Title 12, Chapter II)(entitled "Indorsement Standards") pertains to the endorsements of depositary, collecting, and returning banks. It sets forth

the specific information that shall or may be provided and requires that such information shall be recorded on the reverse side of checks. The Appendix also provides that the readability, identifiability, and legibility of the depositary bank's endorsement must be protected. It cautions the depositary bank not to interfere with the readability of the endorsement, and it carefully sets forth specific requirements for collecting and returning banks to follow for the purpose of protecting that endorsement.

The requirement under the Customs Regulations that Customs employees must place information on the reverse side of monetary instruments conflicts with the requirements of 12 CFR 229.35 and App. D of Part 229 of Title 12 CFR regarding the protection of bank endorsements. In order to ensure that the practice of Customs employees in accepting checks and other monetary instruments does not interfere with the readability, identifiability, and legibility of endorsements of depositary and other banks, Customs proposes to amend § 24.1(b) and § 24.1(b)(1).

Section 24.1(b)(1) is proposed to be amended to reflect that authorized Customs employees are no longer required to place their name and badge number on the instrument and that the collection voucher number (or other identifier) should now be placed on the face (front) side of the instrument, rather than the reverse side of the instrument. Section 24.1(b) is proposed to be amended to reflect that certain other information that is required on the instrument also should be placed on the face of the check. This information includes the payor's home and business phone numbers and either a social security number, current passport number, or current driver's license number (showing the issuing state).

COMMENTS

Before adopting this proposal as a final rule, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4 of the Treasury Department Regulations (31 CFR 1.4), and § 103.11(b) of the Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9 a.m. and 4:30 p.m. at the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1300 Pennsylvania Avenue, N.W., 3rd Floor, Washington, D.C.

EXECUTIVE ORDER 12866

This document does not meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that the proposed amendments to the Customs Regulations, if adopted, will not have a significant economic impact on a substantial number of small entities. Adoption of the proposed

amendments regarding the endorsement of checks and other instruments will improve the process for accepting and depositing these instruments, without any additional burden on businesses or individuals. Accordingly, the proposed amendments are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

DRAFTING INFORMATION

The principal author of this document was Bill Conrad, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices contributed in its development.

LIST OF SUBJECTS IN 19 CFR PART 24

Accounting, Claims, Customs duties and inspection, Fees, Financial and accounting procedures, Imports, Taxes.

PROPOSED AMENDMENTS TO THE REGULATIONS

For the reasons stated in the preamble, part 24 of the Customs Regulations (19 CFR part 24) is proposed to be amended as follows:

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

1. The general authority citation for part 24 and the relevant specific authority citation continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58a–58c, 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1450, 1624; 31 U.S.C. 9701.

Section 24.1 also issued under 19 U.S.C. 197, 198, 1648;

* * * * * * *

2. In § 24.1, the second and third sentences of introductory paragraph (b) and all of paragraph (b)(1) are revised to read as follows:

§ 24.1 Collection of Customs duties, taxes, and other charges.

* * * * * * *

(b) * * *

Where the amount of the check is over $25, the Customs cashier or other employee authorized to receive Customs collections will ensure that the payor's name, home and business telephone number (including area code), and date of birth are recorded on the face (front) side of the monetary instrument. In addition, one of the following will be recorded on the face side of the instrument: preferably, the payor's social security number or, alternatively, a current passport number or current driver's license number (including issuing state).

* * * * * * *

(1) Where the amount is less than $100 and the identification requirements of paragraph (a)(4) of this section have been met, the Customs employee accepting the check or money order will place his name and badge number on the collection voucher and place the serial number or

other form of voucher identification on the face side of the check or money order so that the check or money order can be easily associated with the voucher.

* * * * * * *

RAYMOND W. KELLY,
Commissioner of Customs.

Approved: September 15, 1999.
JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, November 17, 1999 (64 FR 62619)]

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19 CFR Part 12

RIN 1515–AC36

FORCED OR INDENTURED CHILD LABOR

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations to provide for the seizure and forfeiture of merchandise that is found to be a prohibited importation under applicable Customs law concerning products of convict labor, forced labor, or indentured labor under penal sanctions. Furthermore, this document proposes to amend the Customs Regulations to make clear that nothing in those regulations precludes Customs from seizing for forfeiture merchandise imported in violation of applicable Federal criminal law dealing with prison-labor goods. The proposed amendments are intended to stop illegal shipments of products of forced or indentured child labor and to punish violators.

DATE: Comments must be received on or before January 18, 2000.

ADDRESS: Written comments may be addressed to and inspected at the Regulations Branch, U.S. Customs Service, 1300 Pennsylvania Avenue, N.W., 3rd Floor, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Glen E. Vereb, Office of Regulations and Rulings, 202–927–2320.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 307 of the Tariff Act of 1930 (19 U.S.C. 1307), generally prohibits the importation of goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor

under penal sanctions. Such prohibitions are enforced by Customs under §§ 12.42–12.44 of the Customs Regulations (19 CFR 12.42–12.44).

If Customs finds, on the basis of information presented and investigated under the procedures described in § 12.42(a)–(e), that a class of merchandise is subject to the prohibition under section 307, the Commissioner of Customs, with the approval of the Secretary of the Treasury, will publish a finding to this effect in the weekly issue of the Customs Bulletin and in the Federal Register, as prescribed in § 12.42(f).

Under § 12.43, an importer is afforded the opportunity to furnish proof within 3 months after importation in order to establish the admissibility of particular imported merchandise detained by Customs under § 12.42(e) or covered by a finding under § 12.42(f), that the particular merchandise being imported is not itself produced with the use of a type of labor specified in section 307.

Section 12.44 deals with the disposition of merchandise determined to be inadmissible under section 307. Currently, § 12.44 provides in pertinent part that such merchandise (1) may be exported at any time within the 3-month period after importation or (2) if not so exported and if no proof of admissibility has been provided, the importer is advised in writing that the merchandise is excluded from entry and, 60 days thereafter, the merchandise is deemed abandoned and will be destroyed unless a protest is filed under 19 U.S.C. 1514.

Forced or Indentured Child Labor

A general provision in the Fiscal Year (FY) 1998 Treasury Appropriations Act made clear what is implicit in the law: that merchandise manufactured with the use of forced or indentured child labor falls within the prohibition of section 1307. This Act requires that Customs not use any of the appropriation to permit the importation into the United States of such merchandise.

Following the enactment of the FY 1998 appropriations amendment regarding forced or indentured child labor, both the Treasury Department and the National Economic Council chaired in-depth interagency discussions aimed at strengthening the capability of the Executive Branch to enforce the prohibition on forced or indentured child labor imports.

To this end, the Treasury Department, by a document published in the Federal Register on June 5, 1998 (63 FR 30813), proposed the establishment of a Treasury Advisory Committee on International Child Labor Enforcement, whose ultimate purpose is to support a vigorous law enforcement initiative to stop illegal shipments of products of forced or indentured child labor and to punish violators.

Proposed Amendment

Accordingly, as part of the foregoing initiative, Customs proposes to amend § 12.44 regarding the disposition to be accorded merchandise that is a prohibited importation under section 307.

Specifically, under the proposed amendment, in the case of merchandise covered by a finding under § 12.42(f), if the Commissioner of Customs advises the port director that the proof furnished under § 12.43 does not establish the admissibility of a particular importation of such merchandise, or if no proof is furnished in this regard, the merchandise will then be seized and subject to the commencement of forfeiture proceedings under subpart E of part 162 of the Customs Regulations (19 CFR part 162, subpart E). Currently, such merchandise is permitted to be exported at any time before it is deemed to have been abandoned.

Also, Customs further proposes to amend § 12.44 to state expressly that nothing in the Customs Regulations (19 CFR Chapter I) precludes Customs from seizing for forfeiture merchandise imported in violation of applicable Federal criminal law (18 U.S.C. 1761–1762) dealing with prison-labor goods.

COMMENTS

Before adopting this proposal as a final rule, consideration will be given to any written comments that are timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Branch, U.S. Customs Service, 1300 Pennsylvania Avenue, N.W., 3rd Floor, Washington, D.C.

REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 12866

Because the importation of goods, wares, articles, and merchandise mined, produced or manufactured wholly or in part in any foreign country by forced labor is prohibited, Customs anticipates that there will not be a substantial number of small entities that would become involved in a prohibited importation. The rule applies to products subject to a "finding" that the class of merchandise was produced with forced or indentured child labor, a more formal Customs action with a higher burden of proof than simple Customs detention of merchandise based on reasonable suspicion. Also the range of countries and products which are likely to be implicated in forced or indentured child labor findings is likely to be fairly narrow. Accordingly, it is certified, in accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that, if adopted, the proposed rule will not have a significant economic impact on a substantial number of 5a small entities. Nor does the document meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

LIST OF SUBJECT IN 19 CFR PART 12

Customs duties and inspection, Entry of merchandise, Imports, Prohibited merchandise, Restricted merchandise, Seizure and forfeiture.

PROPOSED AMENDMENTS TO THE REGULATIONS

It is proposed to amend part 12, Customs Regulations (19 CFR part 12), as set forth below.

PART 12—SPECIAL CLASSES OF MERCHANDISE

1. The general authority citation for part 12 would continue to read as follows, and the relevant specific sectional authority would be revised to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States (HTSUS)), 1624;

* * * * * * *

Sections 12.42 through 12.44 also issued under 19 U.S.C. 1307 and Pub. L. 105–61 (111 Stat. 1272);

* * * * * * *

2. It is proposed to amend § 12.42 by revising the first sentence of paragraph (a) to read as follows:

§ 12.42 Findings of Commissioner of Customs.

(a) If any port director or other principal Customs officer has reason to believe that any class of merchandise which is being, or is likely to be, imported into the United States is being produced, whether by mining, manufacture, or other means, in any foreign locality with the use convict labor, forced labor, or indentured labor under penal sanctions, including forced or indentured child labor, so as to come within the purview of section 307, Tariff Act of 1930, he shall communicate his belief to the Commissioner of Customs. * * *

* * * * * * *

3. It is proposed to revise § 12.44 to read as follows:

§ 12.44 Disposition.

(a) *Seizure and summary forfeiture.* In the case of merchandise covered by a finding under § 12.42(f), if the Commissioner of Customs advises the port director that the proof furnished under § 12.43 does not establish the admissibility of the merchandise, or if no proof has been furnished, the port director shall seize the merchandise for violation of 19 U.S.C. 1307 and commence forfeiture proceedings pursuant to part 162, subpart E, of this chapter.

(b) *Prison-labor goods.* Nothing in this chapter precludes Customs from seizing for forfeiture merchandise imported in violation of 18 U.S.C. 1761 and 1762 concerning prison-labor goods.

RAYMOND W. KELLY,
Commissioner of Customs.

Approved: August 12, 1999.

JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, November 17, 1999 (64 FR 62618)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10278

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa Anne Ridgway

Senior Judges

James L. Watson

Herbert N. Maletz

Nicholas Tsoucalas

R. Kenton Musgrave

Clerk

Leo M. Gordon

Decisions of the United States Court of International Trade

(Slip Op. 99–113)

NTN BEARING CORP. OF AMERICA, NTN CORP., AMERICAN NTN BEARING MFG. CORP., NTN DRIVESHAFT, INC., AND NTN-BOWER CORP., PLAINTIFFS AND DEFENDANT-INTERVENORS *v.* UNITED STATES, DEFENDANT, AND KOYO SEIKO CO., LTD., KOYO CORP. OF U.S.A., NSK LTD., AND NSK CORP., DEFENDANT-INTERVENORS, AND TORRINGTON CO., DEFENDANT-INTERVENOR AND PLAINTIFF

Consolidated Court No. 97–01–00092

(Dated October 22, 1999)

ORDER

TSOUCALAS, *Senior Judge:* Upon consideration of the motion of defendant-intervenors Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. (hereinafter collectively "Koyo"), for reconsideration, it is hereby

ORDERED that, in light of the decision of the Court of Appeals for the Federal Circuit in *NSK Ltd. v. United States*, 1999 U.S. App. LEXIS 21338, at *21–*30 (Fed. Cir. Sept. 2, 1999), this Court's Order in Slip Op. 99–71, dated July 29, 1999, is modified by redacting the last paragraph of page fifteen remanding the case to the Department of Commerce with instructions to "review the record to determine whether it is possible to isolate and remove the portions of Koyo's warranty expenses which relate to non-scope merchandise from the adjustments to FMV or to deny the adjustment if such a distinction and apportionment cannot be made"; and it is further

ORDERED that this Court's Order in Slip Op. 99–71 is further modified by extending the date by which the remand results are due to the Court an additional thirty (30) days; and it is further

ORDERED that the remainder of Slip Op. 99–71 is unchanged; and it is further

ORDERED that the Department's final results are affirmed as they apply to Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A.

(Slip Op. 99–114)

BÖHLER-UDDEHOLM CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND ALLEGHENY LUDLUM STEEL CORP., WASHINGTON STEEL CORP., AND G.O. CARLSON, INC., DEFENDANT-INTERVENORS

Consolidated Court No. 95–08–01024

[Injunction pending appeal granted.]

(Dated October 22, 1999)

O'Donnell & Williams, (R. Kevin Williams) for plaintiff.

David W. Ogden, Acting Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Lucius B. Lau), Carlos A. Garcia*, Attorney-Advisor, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Collier, Shannon, Rill & Scott, PLLC, (John B. Brew and *Jeffrey S. Beckington)* for defendant-intervenors.

OPINION

RESTANI, *Judge:* This matter is before the court on plaintiff's motion for injunction of liquidation pending appeal.[1]

Plaintiff appealed the court's judgment affirming the determination of the United States Department of Commerce that its products, Stavax and Ramax, were within the scope of the antidumping duty order on Stainless Steel Plate from Sweden. *See Böhler-Uddeholm Corp. v. United States*, No.95–08–01024, 1998 WL 249167, at *1 (Ct. Int'l Trade May 14, 1998), *appeal filed*, No. 98–1565 (Fed. Cir. July 6, 1998). Plaintiff now seeks a stay of liquidation of entries made during the period June 1, 1998 through May 31, 1999, so that it may recover the estimated duties paid, if it is successful in its appeal of the scope issue. The United States consents to the stay, but it is opposed by defendant-intervenors, the domestic steel producers.

Defendant-intervenors first object that the motion is untimely. An administrative review of the entries at issue, however, resulted in suspension of liquidation of those entries. Thus, a court ordered stay was unnecessary during the pendency of the review. The Commerce Department terminated the review on September 14, 1999. *See Stainless Steel Plate from Sweden: Notice of Recission of Antidumping Administrative Review*, 64 Fed. Reg. 49,773, 49,774 (Dep't Commerce 1999). Thereafter Commerce issued liquidation instructions to the Customs Service. Pl.'s Br. at 2. The instant motion was made promptly upon the threat of imminent liquidation and is timely.

Defendant-intervenors also assert that the standard for injunctive relief is not met. First, they assert that *Zenith Radio Corp. v. United States*, 710 F.2d 806, 808 (Fed. Cir. 1983) (stay of liquidation pending appeal by domestic producers of annual review determination) does not apply because liquidation of these entries will not moot the scope issue

[1] Plaintiff styled its motion as one for preliminary injunction, but it is properly brought pursuant to CIT Rule 62(d), and 19 U.S.C. § 1516a(c)(2) (1994). If applicable, the requirement of a supersedeas bond has been met by the prepayment of estimated duties on the unliquidated entries, as required by 19 U.S.C. § 1673e(a)(3) (1994). Defendant-intervenors allege no possible basis for a bond.

before the appellate court. Def.-Intervenor's Br. at 3. Plaintiffs, however, are importers. They will lose their right to recover the duties paid for the period at issue if stay is not granted. That such recovery depends on the scope determination, as opposed to issues which might be addressed more effectively in an administrative review, is not determinative. Further, in *Zenith* more than preservation of appellate review was at stake. *Zenith*, at 810. Because the adminstrative review set future deposit rates, the entire dispute would not have been mooted by liquidation of past entries. *Id.* Likewise, just because the entire scope dispute is not mooted by liquidation of this set of entries, does not mean that plaintiffs will not suffer irreparable harm in the form of permanently lost duties, if stay of liquidation is not granted. The stay sought is appropriately limited to only the potential irreparable harm plaintiff would suffer in the absence of the stay.

Second, although the court ruled against plaintiffs, it also made clear in its four opinions in this matter that the scope issue was a difficult one, as demonstrated by the repeated consideration of the issue. *See Böhler-Uddeholm Corp. v. United States*, 20 CIT 1336, 1342–43, 946 F. Supp. 1003, 1008–1009 (1996) (remanding Commerce's scope determination), 978 F. Supp. 1176, 1181–1185 (Ct. Int'l Trade 1997) (remanding Commerce's scope determination again), No. 95–08–01024, 1997 WL 792936, at *1–2 (Ct. Int'l Trade Dec. 22, 1997) (remanding Commerce's scope determination to allow consideration of the full record), 1998 WL 249167, at *2 (affirming Commerce's scope determination). There is no clear answer as to whether or how Commerce may amend a twenty year old scope ruling, as it did here. *Böhler-Uddeholm Corp.*, 1998 WL 249167, at *1. There are serious and substantial questions for appeal as to whether this situation meets the appropriate standard for such an amendment.

Third, the only party capable of suffering hardship in this matter is plaintiff. It was required to pay such estimated duties as were owed. The government's and defendant-intervenors' rights are fully protected, as the government obviously recognizes.

Fourth, injunction is in the public interest. Defendant-intervenors would have a party such as plaintiff request an administrative review, with all the time and effort such a review would entail, merely for the purpose of continuing a suspension of liquidation. Def.-Intervenor's Br. at 2. The relief plaintiff seeks is available through injunction pending appeal, at no cost or inconvenience to anyone, and without gearing up the entire administrative process for no good reason.

Accordingly, the court concludes that the requirements for injunctive relief, recognized in *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993),[2] are met. Injunction pending appeal is granted. The terms of the injunction are set forth separately.

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[2] In order to obtain an injunction, the movant carries the burden to establish: "1) that the movant is likely to succeed on the merits [on appeal]; 2) that it will suffer irreparable harm if [provisional] relief is not granted; 3) that the balance of the hardships tips in the movant's favor; and 4) that a [provisional] injunction will not be contrary to the public interest." *Id.* (citations omitted).

(Slip Op. 99–115)

SKF USA INC., SKF FRANCE S.A. AND SARMA, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO., DEFENDANT-INTERVENOR

Consolidated Court No. 97–01–00054

(Dated October 28, 1999)

JUDGMENT

TSOUCALAS, *Senior Judge:* This Court having received and reviewed the United States Department of Commerce, International Trade Administration's ("Commerce") Final Results of Redetermination Pursuant to Court Remand, *SKF USA Inc. v. United States*, 23 CIT ____, Slip Op. 99–56 (June 29, 1999) ("Remand Results"), and Commerce having complied with the Court's remand, and no responses to the Remand Results having been submitted by the parties, it is hereby

ORDERED that the Remand Results filed by Commerce on September 10, 1999 are affirmed in their entirety; and it is further

ORDERED that since all other issues have been decided, this case is dismissed.

(Slip Op. 99–116)

SKF USA INC. AND SKF INDUSTRIE S.P.A., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO., DEFENDANT-INTERVENOR

Consolidated Court No. 97–01–00054–S1

(Dated October 28, 1999)

JUDGMENT

TSOUCALAS, *Senior Judge:* This Court having received and reviewed the United States Department of Commerce, International Trade Administration's ("Commerce") Results of Redetermination Pursuant to Court Remand, *SKF USA Inc. and SKF Industrie S.p.A. v. United States*, 23 CIT ____, Slip Op. 99–43 (May 13, 1999) ("Remand Results"), and Commerce having complied with the Court's remand, and no responses to the Remand Results having been submitted by the parties, it is hereby

ORDERED that the Remand Results filed by Commerce on August 12, 1999 are affirmed in their entirety; and it is further

ORDERED that since all other issues have been decided, this case is dismissed.

(Slip Op. 99–117)

TA CHEN STAINLESS STEEL PIPE, LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND AVESTA SHEFFIELD, INC., ET. AL., DEFENDANT-INTERVENORS

Court No. 97–08–01344

[Antidumping determination remanded.]

(Dated October 28, 1999)

Ablondi, Foster, Sobin & Davidow, p.c. (Joel Davidow and *Peter Koenig)* for plaintiff.

David W. Ogden, Acting Assistant Attorney General, *David M. Cohen*, Director, *Velta A. Melnbrencis*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Mark L. Josephs)*, *Christine Savage*, Office of the General Counsel, United States Department of Commerce, of counsel, for defendant.

Collier, Shannon, Rill & Scott, PLLC, (David A. Hartquist, Jeffrey S. Beckington, and *Kathleen W. Cannon)* for defendant-intervenors.

OPINION

RESTANI, *Judge:* This matter is before the court on a motion for judgment upon the agency record pursuant to USCIT Rule 56.2. Ta Chen Stainless Steel Pipe, Inc. ("Ta Chen" or "plaintiff") challenges certain aspects of an antidumping duty determination by the Department of Commerce ("Commerce" or "the Department"). *See Certain Welded Stainless Steel Pipe from Taiwan*, 62 Fed. Reg. 37,543 (Dep't Commerce 1997) (final results of admin. rev.) [hereinafter "*Final Results*"]. Avesta Sheffield Inc., Damascus Tube Division, Damascus-Bishop Tube Co., and United Steelworkers of America (AFL-CIO/CLC) appear as defendant-intervenors (collectively "Defendant-Intervenors" or "Domestic Interested Parties") to Ta Chen's motion.

In 1992, Commerce determined that welded stainless steel pipe ("WSSP") from Taiwan was being sold at less than fair value, and accordingly issued an antidumping order. *Certain Welded Stainless Steel Pipe from Taiwan*, 57 Fed. Reg. 62,300 (Dep't Commerce 1992) (amended final determination and antidumping duty order). In December 1995, Commerce published its notice of opportunity to request an administrative review of the dumping order for the third administrative review period, covering December 1, 1994 through November 30, 1995. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation*, 60 Fed. Reg. 62,070, 62,071 (Dep't Commerce 1995). Ta Chen requested a review and Commerce initiated an antidumping duty administrative review of WSSP on February 1, 1996. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 61 Fed. Reg. 3,670, 3,671 (Dep't Commerce 1996).

Ta Chen received a dumping margin of 6.06 percent, which was based on partial adverse facts available. *Final Results*, 62 Fed. Reg. at 37,556. Ta Chen challenges several aspects of the determination leading to the application of adverse facts.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (1994). In reviewing final determinations in antidumping duty investigations, the

court will hold unlawful those agency determinations which are unsupported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i) (1994).

I. Ta Chen's affiliation with Sun Stainless

BACKGROUND

Ta Chen is a Taiwanese producer of stainless steel pipe. In its Final Results, Commerce concluded that, pursuant to 19 U.S.C. § 1677(33) (1994), Ta Chen was affiliated with one of its US distributors, Sun Stainless, Inc. ("Sun"), on the grounds of control.[1] *Final Results*, 62 Fed. Reg. at 37,549. Ta Chen disputes this finding and claims it is not affiliated with Sun.

In its first questionnaire, Commerce asked Ta Chen to list all companies affiliated with it, through stock ownership or otherwise. *Initial Questionnaire* (Feb. 13, 1996), at A–4, P.R. Doc. 6, Def.'s App., Tab 1, at 6. The definition of "affiliated person" in the questionnaire's glossary of terms simply restated the statutory definition. *Id.* at App. I, Def.'s App., Tab 1, at 10. The questionnaire also stated that Ta Chen should seek clarification from the Department if it was uncertain whether a company was an affiliate. *Id.* at G–6, Def.'s App., Tab 1, at 5. Commerce also asked Ta Chen to identify its sales as either export price ("EP") or constructed export price ("CEP").[2] *Id.* at C–8, Def.'s App., Tab 1, at 7. In its response, Ta Chen listed several affiliates, but did not include Sun. *See Response to Initial Questionnaire* (Apr. 30, 1996), at 7–8, C.R. Doc. 1, Def.'s App., Tab 2, at 4–5. Ta Chen said that none of its affiliates sold Ta Chen pipe in the United States or Taiwan during the 1994–95 period of review ("POR"), and that none of these affiliates were involved in any aspect of the production of pipe. *Id.* at 8, Def.'s App., Tab 2, at 5. Ta Chen also stated that its US pipe sales were EP sales, and not CEP sales, because the price and quantity for US sales was determined before the pipe was imported into the United States. *Id.* at 4, Def.'s App., Tab 2, at 2. Ta Chen said that its wholly-owned US subsidiary, Ta Chen International ("TCI"), performed no function in connection with Ta Chen's US pipe sales, other than processing paper work. *Id.* Ta Chen stated that pipe did not enter a TCI warehouse in the US, but was shipped directly from Ta Chen in Taiwan to the customer in the United States. *Id.*

In its first supplemental questionnaire, Commerce requested further information on a variety of issues, including a request that Ta Chen explain its relationship with Sun. *First Supplemental Questionnaire* (Oct.

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[1] The name of Sun Stainless was confidential during the administrative proceedings, as was the name San Shing (dba "Sun Stainless"), Sun's predecessor. Ta Chen placed Sun Stainless' name on the public record for these proceedings. *See* Pl.'s Br. at 3 n.6. Ta Chen has since placed San Shing's name on the public record for the final results of the first and second administrative review. *See Certain Welded Stainless Steel Pipe from Taiwan*, 64 Fed. Reg. 33,243, 33,243 (Dep't Commerce 1999) (final results of admin. rev.)

In the *Final Results*, San Shing is referred to as Company A and Sun is referred to as Company B.

[2] Commerce generally calculates the antidumping duty by comparing an imported product's price in the United States to its normal value ("NV"), which represents the price of comparable merchandise in the exporting country. The dumping margin is the amount by which NV exceeds the US price. *See* 19 U.S.C. § 1673 (1994).

The US price is calculated as either EP or CEP. *See* 19 U.S.C. § 1677a (1994). Usually, EP is used when the foreign exporter sells directly to an unrelated US purchaser, and CEP is used when the exporter sells through a related party in the United States which performs substantial selling functions. *See* 19 U.S.C. § 1677a(a)–(b).

22, 1996), at 7, C.R. Doc. 6, Def.'s App., Tab 3, at 3. Ta Chen responded that it had a history of doing business with Sun Stainless, and with San Shing. *Response to First Supplemental Questionnaire* (Nov. 12, 1996), at 34, C.R. Doc. 8, Def.'s App., Tab 4, at 2. Both companies had been distributors of Ta Chen pipe. *Id.* Ta Chen said that in answering Commerce's questions regarding Sun, it assumed that Commerce was seeking information to determine whether Ta Chen and Sun were affiliates. *Id.* at 35–36, Def.'s App., Tab 4, at 3–4. Prior to describing its relationship with Sun, Ta Chen included much legal argument in its response regarding the statutory and regulatory definitions of "related party" and "control." *Id.* at 36, Def.'s App., Tab 4, at 4. Ta Chen focused on the amendments made to these definitions in the Uruguay Round Agreements Act ("URAA"), Pub. L. 103–465, 108 Stat. 4809 (1994), effective January 1, 1995, and argued that Commerce should apply the pre-URAA statutory definition of related parties because the only sales Ta Chen had made to Sun in the third administrative review period occurred in August 1994.[3] *Id.* at 40–41, Def.'s App., Tab 4, at 8–9. Ta Chen does not pursue this argument before the court.

Ta Chen went on to describe a long history with San Shing and Sun Stainless. It described several connections between the companies which are listed in the *Final Results* as follows:

- Sun was established by current or former managers and officers of Ta Chen;
- Sun was staffed by current or former Ta Chen employees;
- Sun distributed only Ta Chen products in the United States;
- TCI had physical custody of Sun's signature stamp;
- TCI had a dedicated computer connection to Sun's records for purposes of credit monitoring;
- Ta Chen's president met with Sun's customers and participated directly in the negotiation of prices of Sun's resales of WSSP; and
- Sun offered its accounts receivable and inventory as collateral for a bank loan to TCI.

Final Results, 62 Fed. Reg. at 37,549. Ta Chen did not provide the Department with information on Sun's US sales in response to the first supplemental questionnaire.

In its second supplemental questionnaire, Commerce asked a series of follow-up questions regarding Ta Chen's relationship with Sun. Commerce wanted to know if Sun bought subject merchandise from any other companies, if any other companies had access to Sun's records, and further detail on Ta Chen's credit monitoring of Sun. *Second Supplemental Questionnaire* (Dec. 24, 1996), at 2–3, C.R. Doc. 15, Def.'s App., Tab 5, at 4–5. In this supplemental questionnaire Commerce did not ask

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[3] The Department verified that after August 1994, Ta Chen had made no sales to Sun, but it had made shipments to Sun, which were imported during the POR in January 1995. *Verification Report* (June 19, 1997), at 4, C.R. Doc. 30, Def.'s App., Tab 8, at 4; *Response to First Supplemental Questionnaire*, at 41, Def.'s App., Tab 4, at 9.

The period of review covers entries, as well as exports or sales, made during the 12 month period at issue. *See* 19 C.F.R. § 353.22(b) (1996) & 19 C.F.R. § 351.213(e)(1)(i) (1999).

Ta Chen to supply information on Sun's US sales, nor did it do so at any later point. Commerce also said that it had "made no determination in the first, second or third administrative reviews as to the proper classification of Ta Chen's U.S. sales." *Id.* at 3, Def.'s App., Tab 5, at 5.

When Commerce issued its *Preliminary Results* in January 1997, three days before Ta Chen responded to the second supplemental questionnaire, the Department preliminarily determined that an application of facts available was warranted for Ta Chen's US sales to Sun because Ta Chen had misreported this portion of its US sales as EP, instead of CEP sales. *Certain Welded Stainless Steel Pipe from Taiwan*, 62 Fed. Reg. 1,435, 1,435 (Dep't Commerce 1997) [hereinafter "*Preliminary Results*"]. Commerce said that the additional information provided by Ta Chen clearly indicated that Sun and Ta Chen were affiliates pursuant to 19 U.S.C. § 1677(33)(G), because Ta Chen was in a position to control Sun, and that therefore Ta Chen's sales to Sun should have been classified as CEP sales.

In its response to the second supplemental questionnaire, Ta Chen answered Commerce's further questions about Sun. In particular, Ta Chen said that it had no reason to believe that Sun purchased WSSP from any one other than Ta Chen. *Response to Second Supplemental Questionnaire* (Jan. 13, 1997), at 9, C.R. Doc. 17, Def.'s App., Tab 6, at 2. Ta Chen also stated that it was not aware of any other company having computer access to Sun's records, and that Ta Chen did not have such access to other customers. *Id.* Ta Chen did not provide information on Sun's US sales at this point, nor did it do so at any other time.

Commerce conducted a verification of Ta Chen's US sales data at TCI's premises in Long Beach, California on June 11 and 12, 1997. *Verification Report*, at 1, Def.'s App., Tab 8, at 1. Commerce issued the *Final Results* on July 14, 1997, and maintained its preliminary determination that Ta Chen was affiliated with Sun. Commerce calculated a margin based on partial adverse facts available, and applied the adverse inference only to a portion of Ta Chen's sales; i.e. the sales to Sun and to Anderson Alloys (see *infra* for discussion of Anderson). *Final Results*, 62 Fed. Reg. at 37,553. Ta Chen contests Commerce's conclusion that it is affiliated with Sun.

DISCUSSION

Section 1677(33) of Title 19 sets out a list of persons who will be considered affiliated, including "Any person who controls any other person and such other person * * *. [A] person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person." 19 U.S.C. § 1677(33)(G).

The Statement of Administrative Action also states that "control" exists "if one person is legally or operationally in a position to exercise restraint or direction over another person." Statement of Administrative Action, accompanying H.R. 103–5110 at 168 (1994), *reprinted in* 1994

U.S.C.C.A.N. 3773, 4174 ("SAA").[4] The SAA explains that this definition of control is a shift from the prior definition.

> The traditional focus on control through stock ownership fails to address adequately modern business arrangements, which often find one firm "operationally in a position to exercise restraint or direction" over another even in the absence of an equity relationship. A company may be in a position to exercise restraint or direction, for example, through corporate or family groupings, franchises or joint venture agreements, debt financing, or close supplier relationships in which the supplier or buyer becomes reliant upon the other.

SAA at 168, 1994 U.S.C.C.A.N. at 4174–75.

Commerce's regulations adopted the statutory definition of "affiliated persons." *See* 19 C.F.R. § 351.102(b) (1999) ("Affiliated persons" and "affiliated parties" have the same meaning as in section 771(33) of the Act [19 U.S.C. § 1677(33)].") In its Notice of Proposed Rulemaking, Commerce explained that "affiliated persons" is a new term, and declined to elaborate on the meaning of either "control" or "affiliated persons." *Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. 7,308, 7,310 (Dep't Commerce 1996) (notice of proposed rulemaking and request for public comments) (proposed regulations to conform to the URAA). In its final rules, Commerce said it would not find that control existed on the basis of "corporate or family groupings; franchise or joint venture agreements; debt financing; and close supplier relationships * * * unless the relationship has the potential to impact decisions concerning the production, pricing or cost of the subject merchandise." *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,380 (Dep't Commerce 1997) (final rules) ["*Final Rules*"].[5] In the comments to these rules, however, Commerce specifically declined to provide further detail on the new affiliation or control standard, stating that it was "more appropriate" for Commerce to develop its practice regarding affiliation "through the adjudication of actual cases." *Id.* at 27,297. The Department stated that it agreed that it should focus on "relationships that have the potential to impact decisions concerning production, pricing or cost," but that this did not mean that "proof is required that a relationship in fact has had such an impact." *Id.* at 27,297–98.

A) Ta Chen's connections with Sun Stainless

Ta Chen argues that none of its connections with Sun placed it in a position to impact Sun's decisions concerning the pricing of WSSP and, therefore, that Ta Chen and Sun should not be considered affiliated parties.

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[4] The Statement of Administrative Action represents "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round Agreements * * *. The Administration understands that it is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this statement." SAA at 1, 1994 U.S.C.C.A.N. at 4040.

[5] This rule was codified at 19 C.F.R. § 351.102. These regulations, implemented to conform to the URAA, became applicable as of July 1, 1997. *See Final Rules*, 62 Fed. Reg. at 27,417. For reviews such as the third administrative review period for Ta Chen, initiated after January 1, 1995 but before the rules came into effect, the Department stated that the final rules would "serve as a restatement of the Department's interpretation of the requirements of the Act as amended by the URAA." *Id.*

1) *Ta Chen and Sun's historical ties*

The Department found that Sun was established by current or former managers and officers of Ta Chen, "at Ta Chen's behest." *Final Results*, 62 Fed. Reg. at 37,549. Frank McLane,[6] a member of Ta Chen's board of directors, incorporated Sun Stainless in the fall of 1993. *Response to First Supplemental Questionnaire*, at 55, Def.'s App., Tab 4, at 22. Sun became operational in November 1993, and Mr. McLane resigned from Ta Chen's board and sold his Ta Chen stock before Sun "began dealing with Ta Chen."[7] *Id.* A former TCI sales consultant, Ken Mayes,[8] was principal in charge of San Shing at the time San Shing took over TCI's inventories and pipe distribution in 1992, and was retained as the principal in charge of Sun Stainless when Sun bought out San Shing. *Id.* at 50–56, Def.'s App., Tab 4, at 18–23. Commerce concluded that "given the longstanding and intimate business dealings between [Ken Mayes] and the president of Ta Chen, we must question the degree of operational autonomy of [San Shing] and [Sun] while under this individual's stewardship." *Final Results*, 62 Fed. Reg. at 37,549.

Ta Chen argues that even if it had a historical affiliation with Sun, the fact that parties were previously affiliated is irrelevant to the question of whether they are currently affiliated. *See Certain Iron Construction Castings from Canada*, 55 Fed. Reg. 460, 460 (Dep't Commerce 1990) (final results of antidumping duty admin. rev.) (fact that respondent sold its interest in possible related party prior to initiation of review was one reason, among others, that ITA declined to make a finding of relatedness). Certainly the existence of a prior affiliation should not be dispositive in making a determination regarding current affiliation. Ken Mayes' intimate knowledge of TCI and Sun's operations may have called into doubt the operational autonomy of San Shing and Sun, but this factor alone does not constitute substantial evidence that Ta Chen controlled either San Shing or Sun. Likewise, the details of Frank McLane's relationship with Ta Chen at the time he incorporated Sun are unclear from the record, and are insufficient to support a finding of affiliation.

2) *Staffing of Sun by current or former Ta Chen employees*

Commerce found that Sun was staffed entirely by current or former employees of Ta Chen. *Final Results*, 62 Fed. Reg. at 37,549. Ta Chen disputes this conclusion and says that no individuals were employed by Ta Chen and Sun at the same time. Pl.'s Br. at 53.

Regarding allegedly common clerical staff, Ta Chen argues that it had a surplus of clerical staff when TCI gave up its US inventory sales busi-

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[6] Frank McLane's name was considered confidential during the third administrative review period, but was subsequently placed on the public record in the final results of the first and second administrative review. *See Certain Welded Stainless Steel Pipe from Taiwan*, 64 Fed. Reg. at 33,244.

[7] The Government states that Mr. McLane did not sell his Ta Chen stock and resign from the board until after the incorporation of Sun. Gov't Br. at 22–23. The exact dates, however, are unclear from the record. *See Response to First Supplemental Questionnaire*, at 55–56, Def.'s App., Tab 4, at 22–23.

[8] Ken Mayes' name was also considered confidential during the third administrative review period, but was placed on the public record for the final results of the first and second administrative review. *See Certain Welded Stainless Steel Pipe from Taiwan*, 64 Fed. Reg. at 33,244.

ness. Ta Chen says that some of these individuals were hired by Sun. *Id.* at 54–55. Ta Chen admits that it did provide Sun with some "routine clerical assistance and training, use of office equipment, suggestions on working with customs brokers, training on shipping procedures, and data entry and bookkeeping type assistance." *Id.* at 55. The staff who provided such assistance allegedly were never employees of Sun, but rather acted on Ta Chen's behalf for Ta Chen's benefit.

Ta Chen argues in this regard that the movement of employees is irrelevant to the question of whether companies are affiliates. *See Oil Country Tubular Goods from Argentina*, 60 Fed. Reg. 33,539, 33,544 (Dep't Commerce 1995) (final determination of sales at LTFV) (finding that a common employee/consultant is "not the same thing as board membership and is not enough to establish control"); *see also Certain Fresh Cut Flowers from Mexico*, 56 Fed. Reg. 1,794, 1,799 (Dep't Commerce 1991) (final results of antidumping duty admin. rev.) (shared address, phone number, and invoice forms of two foreign importers not sufficient to lead to finding of relatedness).

The Department also considered that Ken Mayes had been a common employee of Ta Chen and Sun, and that he had received compensation from Ta Chen after the end of his employment with Ta Chen in 1992. *Final Results*, 62 Fed. Reg. at 37,549. Ta Chen counters that Ken Mayes was an independent contractor with Ta Chen, and that he had been at liberty to work for others even while he was retained by Ta Chen. Pl.'s Br. at 53. Moreover, Ta Chen states that Ken Mayes' independent contractor agreement terminated prior to his employment with San Shing and Sun. *Id.* Ta Chen says that the payment to Ken Mayes was not made until Mayes had left Sun, and that this sum represented a one time payment which Ta Chen owed Ken Mayes pursuant to their earlier contract. *Id.* at 54. The Department has previously stated that the right to a one-time profit sharing conveys no ownership right or control in a company. *See Porcelain-on-Steel Cookware from Mexico*, 62 Fed. Reg. 25,908, 25,914 (Dep't Commerce 1997) (final results of antidumping duty admin. rev.) (Department included respondent's profit-sharing expenses in COP analysis as an expense, but distinguished these expenses from dividends, because "right to participate in profit-sharing conveyed no ownership right in [respondent company]"). Accordingly, Mayes' right to a payment by Ta Chen by itself does not suffice to establish a control relationship.

The Government argues that the history of common personnel supports the conclusion that Ta Chen had the ability to exercise "operational direction or restraint" over Sun. Gov't Br. at 23–24. In light of *Oil Country Tubular* and *Certain Fresh Cut Flowers*, however, it is unlikely that the existence of common clerical staff could, on its own, suffice to support the Department's finding of control. This is particularly so here because Commerce did not articulate how Ta Chen could have used the alleged common staff to direct or restrain Sun.

3) *Sun's distribution of only Ta Chen products*

Another of the Department's reasons for concluding that Ta Chen and Sun were affiliates was the fact that Sun distributed only Ta Chen products in the United States. *Final Results*, 62 Fed. Reg. at 37,549. The Department reasoned that this was akin to a close supplier relationship, which is a factor specifically mentioned in both the SAA and the Department's regulations as indicative of control. Ta Chen argued before Commerce, as it does here, that although Sun bought all of its stainless steel pipe from Ta Chen, Sun was at liberty to buy from other producers. *Final Results*, 62 Fed. Reg. at 37,550; Pl.'s Br. at 51.

Ta Chen says there was no exclusivity agreement with Sun. Further, it argues that even in the presence of such exclusive agreements, Commerce recognizes that such contracts are "common commercial arrangements," and that affiliated party status does not necessarily arise from a customer buying all of its product from one supplier. *See Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea*, 62 Fed. Reg. 18,404, 18,441 (Dep't Commerce 1997) (final results of antidumping duty admin. revs.) (respondent did not control the home-market distributor because there was no evidence that distributor entered into exclusive sales contract other than voluntarily, or that the contract could not be terminated by either party). In *Open-End Spun Rayon Singles Yarn from Austria*, 62 Fed. Reg. 43,701 (Dep't Commerce 1997) (notice of final determination of sales at LTFV), the Department did not find that the respondent and its sole US customer of subject merchandise were affiliates. The Department reasoned that because the respondent's records showed that its US customer's purchases "account for only a small portion of [respondent's] total sales revenue," the respondent was not reliant on this US customer. 62 Fed. Reg. at 43,708.

Commerce responds that a finding of affiliation can be based on a close supplier relationship alone. The Government cites *Stainless Steel Wire Rod from Korea*, 63 Fed. Reg. 40,404 (Dep't Commerce 1998) (notice of final determination of sales at LTFV), where the Department found that the sole supplier, and the sole buyer, of the major input for the production of the subject merchandise were affiliated because the supplier was in a position to control the buyer. 63 Fed. Reg. at 40,410. The buyer, by its own admission, had been unable to develop an alternate source to supply the input. "Thus, the business and economic reality is that the relationship between the parties is significant and, as demonstrated by evidence on the record, not easily replaced." *Id.*; *see also Mitsubishi Heavy Indus., Ltd. v. United States*, 54 F. Supp.2d 1183, 1190–91 (Ct. Int'l Trade 1999) (sustaining Commerce's determination that "any supplier that depended upon [buyer] for 50 percent or more of its sales during each year during a five year period [would] be potentially subject to the restraint or direction of [the buyer]" was reasonable interpretation of term "close-supplier"); *but cf. Furfuryl Alcohol from the Republic of South Africa*, 62 Fed. Reg. 61,084, 61,086 (Dep't Commerce 1997) (fi-

nal results of antidumping duty admin. rev.) (producer and seller not affiliated with its home market customers even though producer was the only manufacturer of subject merchandise in South Africa; Department stated that producer's dominant position in the home market "in and of itself" was not sufficient for a finding of affiliation between producer and its customers).

Given the inclusion of close-supplier relationships in the SAA and the Department's regulations, Commerce's decision to consider the fact that Sun purchased WSSP exclusively from Ta Chen as one factor, among others, as demonstrating Ta Chen's ability to control Sun, was reasonable. Moreover, the determinations Ta Chen cites in support of its position that exclusive sales agreements and close supplier relationships are not sufficient to lead to a finding of affiliation did not involve as many connections between the companies as Commerce found between Ta Chen and Sun. If the affiliation finding hinged on this factor alone, however, the court would be reluctant to uphold the determination as based on substantial evidence. In this case there was no exclusive sales contract, and even when there are exclusive sales contracts, Commerce has found that insufficient for an affiliation finding. *See Certain Cold-Rolled Carbon Steel Flat Products*, 62 Fed. Reg. at 18,441. When the court upheld Commerce's determination based on the "greater-than-fifty-percent-sales-dependence-for-five years" in *Mitsubishi*, the court noted that the subject merchandise was a "highly customized product, requiring unique technical specifications." *Mitsubishi*, 54 F. Supp.2d at 1191. By contrast, there is no suggestion in this case that Sun would have had difficulty obtaining WSSP from other suppliers. Nonetheless, this is one factor that may be considered by Commerce.

4) *TCI's custody of Sun's signature stamp*

Commerce stated that TCI's physical custody of Sun's signature stamp constituted *prima facie* evidence that Ta Chen either "exercised, or was in a position to exercise, control over [Sun's] disbursements." *Final Results*, 62 Fed. Reg. at 37,549. Ta Chen argues against the Department's conclusion regarding this stamp, stating that TCI had this stamp in order to monitor Sun's cash outflows. Pl.'s Br. at 58. Ta Chen further states that it sold Sun a large volume of product on extended payment terms, and that therefore TCI's accounts receivable from Sun "came to be one of TCI's most significant assets." *Id.* Ta Chen says "it was precisely because Ta Chen did not control Sun that stringent credit monitoring measures were sought. The monitoring could provide early warning of cash flow problems which could adversely affect ability to pay debt." *Id.* at 58–59.

Commerce considered Ta Chen's arguments regarding the reasons why it possessed Sun's signature stamp and concluded that Ta Chen had not presented evidence to counter the presumption that it was in a position to control Sun's disbursements. *Final Results*, 62 Fed. Reg. at 37,549. Ta Chen says TCI only stamped checks which were pre-approved by Sun, and that Sun could write its own checks. Pl.'s Br. at 58.

There is no discussion, however, of whether Ta Chen had the right to withhold stamping Sun checks. There is also no record evidence of a written agreement between Ta Chen and Sun regarding Ta Chen's use and possession of Sun's stamp. Possession of the signature stamp provided TCI with the means to control Sun's outflows, whether TCI exercised that power or not. The statute focuses on the capacity to control, rather than on the actual exercise of control. *See Ferro Union, Inc. v. United States*, 44 F. Supp.2d 1310, 1324 (Ct. Int'l Trade 1999) (determination of "control" under URAA "not dependent on actually exercising control, but rather on the *capacity* to exercise control") (emphasis in original). The court therefore concludes that the Department's reasoning that possession of the signature stamp provided Ta Chen with the capacity to control Sun's disbursements was substantially supported.

5) Ta Chen's credit monitoring of Sun

The Department also considered as indicative of control the fact that Ta Chen, through TCI, had a dedicated computer connection to Sun's accounts receivable, accounts payable, and inventory. This access was on a full-time, unlimited basis, which required no passwords or other security mechanisms limiting Ta Chen's access to Sun's records. *Final Results*, 62 Fed. Reg. at 37,549; *Verification Report*, at 5, Def.'s App., Tab 8, at 5.

Ta Chen argues that its credit monitoring of Sun via TCI's possession of Sun's signature stamp was imperfect, and that therefore Ta Chen needed another way to monitor Sun's credit. Pl.'s Br. at 59. Ta Chen submitted a certified statement from an expert in the US steel industry who asserted that, in light of Sun's purchasing of a large volume of product on extended payment terms, the credit monitoring exercised by Ta Chen was not inappropriate between unaffiliated parties. *Response to Second Supplemental Questionnaire*, at 41–42, C.R. Doc. 17, Pl.'s Prop. App., Tab C, at 15–16. Ta Chen also notes a comment to UCC § 9–205 (1999) which says that "policing" or "dominion" by the secured party of its unaffiliated debtor is permissible and expected.[9] Ta Chen also alleges that Commerce's conclusion that Ta Chen's computer access to Sun's records was indicative of control is "speculative" because Commerce did not cite evidence as to why unaffiliated parties would never agree to such credit monitoring.

Ta Chen is misstating the Department's analysis of this issue. Commerce conceded that it is common for creditors to "obtain reports regarding the status of a debtor's business activities," but contended that the "full-time and unlimited access to [Sun's] computer system afforded Ta Chen a far more invasive mechanism for monitoring than would be expected between unaffiliated parties." *Final Results*, 62 Fed. Reg. at

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[9] Ta Chen is referring to an official comment to UCC § 9–205 which states that nothing in the section "prevents * * * 'policing' or dominion as the secured party and the debtor may agree upon; business and not legal reasons will determine the extent to which strict accountability, segregation of collections, daily reports and the like will be employed." Comment 5 to UCC § 9–205.

A finding of affiliation, however, is not inconsistent with secured status. Whether such monitoring is legally permissible is irrelevant to the affiliation determination.

37,549. The court finds that Commerce did not base its affiliation finding simply on the fact that Ta Chen monitored Sun's records, but rather on the means with which Ta Chen effectuated its monitoring. Ta Chen's unlimited access to Sun's accounts does seem highly invasive, and Commerce's conclusion that this monitoring was more invasive than the type which would normally exist between unaffiliated parties was substantially supported.

6) *Participation by Ta Chen president in meetings with Sun customers and negotiation of prices of Sun's resales of WSSP*

The Department also focused on the fact that Robert Shieh, the president of Ta Chen, met with Sun's customers and participated in the negotiation of Sun's resales of WSSP, to conclude that Ta Chen and Sun were affiliates. *Final Results*, 62 Fed. Reg. at 37,549. Commerce found that "Ta Chen's statement that 'it knew the prices which would be accepted by [Sun]' raise[d] additional questions about the extent to which [Sun] was free to act in its own interest." *Id.*

Ta Chen explains that when a customer wanted to buy WSSP at a price acceptable to Sun, Ta Chen would tell the customer to prepare a purchase order for Sun. Pl.'s Br. at 48. The customer would then either send its order directly to Sun, or give it to Ta Chen, who would forward the order to Sun. *Id.* Ta Chen says Sun was free to accept, reject, or modify these orders. *Id.* Ta Chen submitted the testimony of a US steel industry expert to support its argument that such behavior by Ta Chen was standard industry practice. *Response to Second Supplemental Questionnaire*, at 44, C.R. Doc. 17, Pl.'s Prop. App., Tab C, at 18. This expert stated that mill officials visit their unaffiliated distributors' customers and forward the orders, so as not to undermine their distributors by taking the order directly from the distributor's customers. *Id.*

Ta Chen may be correct in arguing that Mr. Shieh's visits to Sun's customers is standard industry practice. Such visits do, however, raise a well-founded suspicion that Ta Chen had a great deal of access to Sun's pricing information. For instance, how could Ta Chen assure a seller that a particular price was acceptable to Sun, unless Ta Chen had intimate knowledge of Sun's pricing and cost decisions? Moreover, simply because certain behavior is standard industry practice does not mean it negates a finding of control. *See Final Rules*, 62 Fed. Reg. at 27,298 (declining to adopt suggestion that Department should not consider "normal commercial relationships" as evidence of control; relationships described in SAA as giving rise to control "can be characterized as 'normal' in the sense that they are commercial relationships commonly entered into by firms. Nevertheless * * * the SAA indicates that they can give rise to control"). Mr. Shieh's ability to set the prices for Sun's resales directly implicates Ta Chen's ability to affect Sun's pricing decisions, in accordance with Commerce's regulatory definition of affiliated parties. *See* 19 C.F.R. § 351.102. The court therefore concludes that this factor was a strong indicator of Ta Chen's ability to control Sun.

7) *Debt financing*

Commerce's decision that Sun and Ta Chen were affiliated also depended on the debt financing arrangement agreed to by Sun. *See Final Results*, 62 Fed. Reg. at 37,549. Commerce found that whether Sun "offered" its accounts receivable and inventory as collateral for a bank loan to TCI, or whether TCI requested that it do so, was not germane to its analysis. "Either way * * * [Sun] 'placed its continued ability to operate in the hands of a putatively unaffiliated party.'" *Id.* (quoting *Preliminary Results*, 62 Fed. Reg. at 1,436.)

In response to Commerce's first supplemental questionnaire, Ta Chen explained that in June of 1993, it sought to maintain a line of credit with its bank for an amount comparable to the amount of TCI's accounts receivable from San Shing.[10] *Response to First Supplemental Questionnaire*, at 57, Def.'s App., Tab 4, at 24. Ta Chen says that TCI consented to a UCC lien in all of its accounts receivable, "a significant portion of which was owed by San Shing." *Id.* In this response, Ta Chen suggested that in order to obtain a more favorable interest rate, San Shing, and subsequently Sun Stainless, provided the bank with the UCC lien on its inventory and accounts receivable directly. *Id.* Ta Chen states that later TCI asked Sun to grant the lien directly, as a way to "simplify a still otherwise ordinary commercial arrangement."[11] Pl.'s Br. at 63. Ta Chen says that the security lien was limited to the unpaid amount which Sun owed Ta Chen for product sold, and that this limitation was stated in side letter agreements. *Id.* The *Final Results* state that the agreement between Ta Chen/TCI and Sun was not in writing. Ta Chen claims that the side letter agreements did exist, and stated at oral argument that these were available to the Department at verification, but that the verifiers chose not to look at them. In its response to the supplemental questionnaire, however, Ta Chen specifically stated that it had been unable to find any written statement memorializing the terms of the agreement, but that "the amount of the TCI take down on its line of credit was to be, and always was, less than the amount owed to TCI by [San Shing or Sun]." *Response to First Supplemental Questionnaire*, at 57–58, Def.'s App., Tab 4, at 24–25. The court is thus uncertain whether a written agreement did exist, but finds it unnecessary to resolve the issue. The particulars of the debt financing suffice to support Commerce's conclusion that it was indicative of a control relationship.

Similar to its arguments regarding Robert Shieh's negotiations with Sun's customers, Ta Chen states that there was nothing unusual about

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[10] TCI's accounts receivable from San Shing were [ ] million and it sought a line of credit with its bank of [ ] million. *Response to First Supplemental Questionnaire*, at 57, Def.'s App., Tab 4, at 24.

[11] Ta Chen cites Commerce's determination in *Polyvinyl Alcohol from Taiwan*, 62 Fed. Reg. 54,823 (Dep't Commerce 1997) (notice of termination of new shipper review), as an example of a customer granting a security interest in its accounts payable to a supplier, without this constituting debt financing that leads to a finding of affiliation. The court has trouble seeing how Ta Chen draws this conclusion from this determination. Commerce stated that the debt financing at issue in *Polyvinyl* did not establish a control relationship, but the particulars of the debt financing are not explained in the determination. *See Polyvinyl*, 62 Fed. Reg. at 54,824.

this debt financing arrangement.[12] Ta Chen also argues that the Department normally bases its understanding of the relationship between parties on how the parties themselves treat their relationship in their financial statements. *See Melamine Institutional Dinnerware Products from Taiwan*, 62 Fed. Reg. 1,726, 1,731 (Dep't Commerce 1997) (notice of final determination of sales at LTFV) (where Department classified amounts as long-term loans "consistent with the treatment in the respondent's financial statement"). Because TCI's audited financial statements do not include a loan from Sun in its list of loan guarantees received from third parties, and because the auditors did not list Sun as an affiliated party in TCI's audited financial statements, Ta Chen argues that the Department should have deferred to this characterization of their relationship. Pl.'s Br. at 66; *see also Response to First Supplemental Questionnaire*, at 69, Pl.'s Prop. App., Tab A, at 37.

Ta Chen overlooks the fact that the original debt financing agreement was entered into with Sun's predecessor, San Shing, and then apparently continued with Sun. This gives rise to the question of why a new entity, Sun, would agree to take on such a risk with a putatively unaffiliated company. Ta Chen also minimizes aspects of the debt financing agreement which concerned Commerce. Commerce explicitly disagreed with Ta Chen's argument that Sun's pledging of it accounts receivable and inventory to TCI "was essentially akin to TCI securing a lien upon [Sun] and, in turn assigning its rights to the bank." *Final Results*, 62 Fed. Reg. at 37,550. Commerce explained:

> the actual transaction involved a significant qualitative difference. In the latter case, TCI's security interest would be limited to the amount [Sun] owed against purchases of inventory. In the former case, [Sun] unilaterally, and without consideration, assigned its entire inventory and accounts receivable directly to TCI's bank to facilitate a loan for TCI. That [Sun] would accept this risk without any consideration—without even a written agreement memorializing the terms and duration of the agreement—does not comport with the commercial realities of dealings between unaffiliated companies.

Id. Ta Chen argues that the consideration for Sun to enter into the agreement was the extended payment terms Ta Chen gave Sun on a large volume of product. From the record, however, it appears that Sun had already obtained the favorable credit terms prior to agreeing to this loan agreement. Indeed, Ta Chen stated that a significant portion of its accounts receivable, prior to seeking the loan, were owed to it by San Shing as a consequence of Ta Chen's large volume of sales to San Shing and the extended credit terms for payments. *Response to First Supplemental Questionnaire*, at 56–57, Def.'s App., Tab 4 at 23–24. The court therefore finds supported Commerce's conclusion that Sun agreed to of-

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[12] Ta Chen again provided Commerce with the opinion of a US steel industry expert who found that Ta Chen's method of securing payment from Sun was "a perfectly normal arrangement between unaffiliated parties." Pl.'s Br. at 65–66; *see also Response to Second Supplemental Questionnaire*, at 41–42, Pl.'s Prop. App., Tab C, at 15–16.

fer its inventory and accounts receivable as collateral for TCI's loan without adequate consideration.

8) *Factors considered as a whole*

The court finds that Commerce's determination that Ta Chen controlled Sun is supported by substantial evidence. Even if each of the individual connections between Ta Chen and Sun, standing alone, may not be sufficient to establish control, Commerce's conclusion that the numerous connections between Ta Chen and Sun were indicative of control was reasonable. Commerce did not rely on any one factor in concluding that Ta Chen and Sun were affiliated parties, rather, it determined that the combination of factors was sufficient proof of affiliation.

Ta Chen argues that Sun paid competitive and negotiated prices for Ta Chen pipe, and that Sun was a profitable company which was sold for a profit. Ta Chen argues that if it were really affiliated with Sun, it would not have sold WSSP to Sun at a lower price and that no one would have been interested in purchasing a company affiliated with another. Pl.'s Br. at 47. Commerce responded to this at oral argument by stating that Ta Chen could have been establishing Sun's future market. Although this response is not completely satisfactory, the possibility of drawing inconsistent conclusions from the evidence does not render it unsupported by substantial evidence. *See Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966) ("possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence") (citations omitted).

Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (citation omitted). Even if the court, deciding the issue anew, concluded that Ta Chen and Sun were not affiliates, Commerce's determination would not be overturned "merely because the plaintiff 'is able to produce evidence * * * in support of its own contentions,'" rather, the plaintiff's evidence "must be enough to convince the Court that a reasonable mind would not have found [Commerce's] evidence sufficient to support its conclusion." *Torrington Co. v. United States*, 14 CIT 507, 513–14, 745 F. Supp. 718, 723 (1990) (quoting *Hercules, Inc. v. United States*, 11 CIT 710, 755, 673 F. Supp. 454, 490 (1987)).

Ta Chen's evidence is not sufficiently convincing for the court to conclude that a reasonable mind would not find Commerce's evidence sufficient to support the affiliation finding. Given the numerous financial connections and opportunities for control between Ta Chen and Sun, and Ta Chen's access to Sun's pricing information, as well as its participation in the negotiation of Sun's sales of WSSP, the court concludes that Commerce's determination that Ta Chen controlled Sun was supported by substantial evidence. Therefore, Commerce's determination that Ta Chen and Sun were affiliated parties is sustained.

B) Failure to provide adequate notice

The court does not find, however, that Commerce's decision to apply facts available was made in accordance with law. Based on its affiliation finding, Commerce concluded that Ta Chen's sales to Sun should be classified as CEP sales, and applied an adverse facts available margin to these sales because Ta Chen did not provide information on Sun's US sales. The Department, however, never specifically requested this information. When Ta Chen learned that the Department would classify its sales as CEP, the time for Ta Chen to place unsolicited information on the record had passed.

Commerce argues that the questions in its original questionnaire informed Ta Chen that, in general, it needed to provide US sales information for its affiliated resellers. Gov't Br. at 33–34. This argument minimizes the fact that Commerce specifically told Ta Chen in the second supplemental questionnaire that it had not yet decided how to classify Ta Chen's US sales. *See Second Supplemental Questionnaire*, at 3, Def.'s App., Tab 5, at 5. Commerce must have been aware when it issued this second supplemental questionnaire on December 24, 1996 that there was a possibility that it would treat Ta Chen and Sun as affiliates, given that it made such a determination in the *Preliminary Results*, issued two weeks later on January 10, 1997. Commerce could therefore foresee that in order to properly calculate Ta Chen's sales as CEP sales, it would need information on Sun's US sales. But Commerce did not ask for this information specifically. In fact, it appears to have tried to avoid giving Ta Chen a belated chance to amend.

Commerce has a statutory obligation to provide respondents with a chance to remedy deficient submissions. *See* 19 U.S.C. § 1677m(d) (1994). The statute provides in relevant part:

> If the administering authority or the Commission determines that a response to a request for information under this subtitle does not comply with the request, the administering authority * * * shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle.

Commerce did not provide Ta Chen with such a remedial opportunity to place information of Sun's US sales on the record in this review. Commerce implies that Ta Chen could have provided the information on Sun's US sales after the issuance of the preliminary results. Gov't Br. at 40. The time for Ta Chen to provide unsolicited information, however, had already passed. *See* 19 C.F.R. § 353.31(a)(ii) (1996) (submission of factual information to be submitted not later than "the earlier of the date of publication of notice of preliminary results of review or 180 days

after the date of publication of notice of initiation of the review").[13] The initiation of the review in this case was published on February 1, 1996, which would have required Ta Chen to submit all factual information by August 1, 1996, six months before Ta Chen was informed that the Department would consider its sales to Sun as CEP sales.

The failure by Commerce to provide respondents with sufficient notice can render the decision "unsupported by substantial evidence and otherwise contrary to law." *Usinor Sacilor v. United States*, 19 CIT 711, 745, 893 F. Supp. 1112, 1141–42 (1995) (Department failed to notify plaintiff that it lacked necessary information to assess likely effects of subsidy program in countervailing duty case; plaintiffs not aware of deficiency until issuance of final results), *aff'd in part and rev'd in part*, 1999 WL 641231 (Fed. Cir. Aug. 24, 1999). In *Usinor*, the court found that broad questions initially asked of plaintiff did not "discharge [Commerce] from its obligation to put parties on notice as to the deficiencies in their responses." *Id.* The court will not endorse "an investigation where [Commerce] sent out a general questionnaire and a brief deficiency letter, then effectively retreated into its bureaucratic shell, poised to penalize [respondent] for deficiencies not specified in the letter that [Commerce] would only disclose after it was too late, i.e., after the preliminary determination." *Bowe-Passat v. United States*, 17 CIT 335, 343 (1993).

Although Ta Chen, unlike the respondent in *Bowe-Passat*, did not try to provide the missing information after the preliminary results, Commerce has behaved in the same way as it did in *Bowe-Passat* by failing to notify the respondent of the deficiency when it had an opportunity to do so, prior to issuing the preliminary results. Commerce's preliminary determination that Ta Chen and Sun were affiliated, and its decision to apply an adverse margin because Ta Chen failed to provide information on Sun's US sales, does not constitute notice pursuant to 19 U.S.C. § 1677m(d). Although it is not completely clear that the Department would have rejected the information had Ta Chen tried to submit it after the preliminary results, Commerce's less than open approach to Ta Chen indicates rejection was likely. At oral argument, the government argued that Ta Chen was required to ask the Department to ask Ta Chen to provide Sun's US sales information. But it is Commerce, not the respondent, which bears the burden of asking questions. *See NSK Ltd. v. United States*, 19 CIT 1319, 1328, 910 F. Supp. 663, 671 (1995) ("[r]espondents should not be required to guess the parameters of Commerce's interpretation of a phrase in the statute.")

Commerce grounds its argument on the truism that the respondent has the burden of creating an accurate record. *See Chinsung Indus. Co. v. United States*, 13 CIT 103, 106, 705 F. Supp. 598, 601 (1989) (burden of creating an adequate record rests with respondents). This truism, how-

[13] The current version of this regulation provides that submission of factual information is due no later than "[for] the final results of an administrative review, 140 days after the last day of the anniversary month, except that factual information requested by the verifying officials from a person normally will be due no later than seven days after the date on which the verification of that person is completed." 19 C.F.R. § 351.301(b)(2) (1999).

ever, cannot obviate Commerce's obligation to let the respondent know what information it really wants. *See Queen's Flowers de Colombia v. United States*, 981 F. Supp. 617, 628 (Ct. Int'l Trade 1997) ("alleged response deficiency cannot support application of [best information available] where the information sought was apparently never requested.") (citation omitted).

Commerce has an obligation to make the questions affected by affiliation issues clear, in light of its own recognition that affiliation is a complex concept and its decision to develop its practice in this area on a case by case basis.[14] *See Final Rules*, 62 Fed. Reg. at 27,297. Commerce must therefore assure itself that it has asked questions sufficient to provide it with enough information to make both the affiliation determination itself and the resulting determinations. In this case Ta Chen had a good basis to argue that it did not control Sun and it made that argument to Commerce. If a respondent reasonably believes it is not affiliated with its reseller, and therefore that it has EP rather than CEP sales, then it has a reason not to submit information on the subject reseller's US sales until Commerce tells the respondent that it wants the information on the particular reseller or until Commerce's questions are clear enough that the respondent knows what it should submit.[15] In this situation where a new statute was not fully explained and Commerce suspected that it would make a finding of affiliation between the importer and the US reseller, it should have placed the respondent on notice, specifically requested information on that reseller's US sales, and requested any other information necessary to the CEP calculation. If Commerce wishes to place the full burden of error of an affiliation assessment on the respondent, at a minimum it must make that clear, otherwise this is simply another instance of error which respondents must have an opportunity to correct under 19 U.S.C. § 1677m(d).[16]

Commerce may not use Ta Chen's failure to submit Sun's US sales information as justification for an application of adverse facts available. On remand, Commerce must provide Ta Chen an opportunity to supply the information on Sun's US sales.

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[14] Commerce stated in the *Final Results* that by the time of this review, Ta Chen must have had an understanding of affiliation. *Final Results*, 62 Fed. Reg. at 37,552. Although the URAA went into effect in January 1995, Commerce did not issue its final regulations to comport with the new statute until 1997, and the third administrative review of Ta Chen began in 1996. The court therefore cannot conclude that a respondent in Ta Chen's situation could be expected to have a thorough understanding of how Commerce would apply the new affiliation standard, where Commerce itself said that it would develop its affiliation practice, "through the adjudication of actual cases." *Final Rules*, 62 Fed. Reg. at 27,297.

[15] Contrast this fact situation with that of respondent in *Pohang Iron and Steel Co. v. United States*, No. 98-04-00906, 1999 WL 970743, at *15 (Ct. Int'l Trade Oct. 20, 1999) (Commerce twice asked for specific information necessary to calculate CEP and respondent specifically declined to provide data on basis EP applied).

[16] Even if Commerce's procedures and questions are clear, this may be insufficient to prevent Commerce from having to provide a respondent with the opportunity to remedy a deficient submission when it discovers the omission early enough for remediation to occur. Defendant made clear that it was not arguing that the statute allows an exception to the opportunity for correction provision based on inexcusable neglect or wilful hiding of information. This may be a defect in the statute which Commerce is seeking to offset. In any case, as the requisite clarity was not present here, the court does not address this issue.

II. Purported sales to Company C

BACKGROUND

In the *Final Results*, Commerce concluded that Ta Chen failed to report commissions to one of its US customers, Anderson Alloys,[17] on sales purportedly made to one of its US Customers, Company C.[18] *Final Results*, 62 Fed. Reg. at 37,544. Commerce concluded that Ta Chen misreported an unknown number of sales to this customer and decided to apply adverse facts available to all of Ta Chen's sales made to Anderson. *Id.* Commerce stated that Ta Chen had not acted to the best of its ability, and that Ta Chen's reported data did not permit Commerce to segregate the misreported sales for purposes of calculating the final margin. *Id.*

Commerce's initial questionnaire requested that Ta Chen report the unit cost of commissions paid to affiliated and unaffiliated selling agents, and to describe the terms under which commissions were paid and how commission rates were determined.[19] *Initial Questionnaire*, at C–20, Def.'s App., Tab 1, at 8. Ta Chen responded that during the POR, it paid commissions to only one unaffiliated party.[20] *Response to Initial Questionnaire*, at 48–49, Def.'s App., Tab 2, at 6–7.

Commerce's conclusion that Ta Chen misreported commissions stems from questions which Commerce officials asked Robert Shieh, president of Ta Chen and TCI, during verification at TCI in June 1997. In connection with questions regarding TCI's sales process, verification officials asked Mr. Shieh to "discuss his involvement in sales of * * * merchandise and the pricing methodology of TCI." *Verification Report*, at 5, Def.'s App., Tab 8, at 5. Mr. Shieh described his visits to various distributors during the POR, including one visit to one of Anderson Alloy's customers, Company C. The report goes on to state that:

> Mr. Shieh also clarified that prices between Anderson Alloys and [Company C] were negotiated by Anderson Alloys. In addition, he stated that there are times when Ta Chen has sold direct to [Company C]. During such instances, Ta Chen negotiated the price with [Company C]. Ta Chen would then pay Anderson Alloys a commission.

Id. There was no further discussion or elaboration of these sales at any point during verification.

In an internal memorandum, the case analyst stated that "newly-disclosed facts" were made at verification, pertaining to sales Ta Chen reported as being made to Anderson. "Ta Chen revealed for the first time that certain of these sales had, in fact, been made to yet another customer, [Company C], an entity which has never before been referenced in this administrative review." *Analysis Memorandum for Final Results of*

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[17] Subsequent to the issuance of the *Final Results*, Ta Chen placed the name, Anderson Alloys, on the public record. *See* Pl.'s Br. at 3 n. 6. In the *Final Results*, Anderson is referred to as "one of Ta Chen's US customers."

[18] [ ].

[19] In order to calculate NV, the statute allows Commerce to account for certain differences in the circumstances of sales in the United States and foreign markets. *See* 19 U.S.C. § 1677b(a)(6)(C)(iii) (1994). Pursuant to its regulations, Commerce makes circumstances of sale adjustments for direct selling expenses, including commissions. *See* 19 C.F.R. § 351.410(b) & (c) (1999).

[20] [ ]

1994–1995 Ta Chen Review (July 1, 1997), at 2, C.R. Doc. 32, Def.'s App., Tab 9, at 2. This memorandum also characterized Mr. Shieh's comments as a statement that Anderson Alloys was a commissionaire on sales to Company C during the POR. *Id.* The memorandum further stated:

> [Ta Chen] deliberately misreported an unknown portion of its sales to Anderson * * *. Furthermore, Ta Chen stated affirmatively for the record that it paid commissions to one only U.S. commissionaire * * *. Prior to verification Ta Chen never indicated that it paid commissions to Anderson or to any other party, and Ta Chen's U.S. data do not reflect commission amounts on any of the sales Ta Chen identified as being to Anderson. Thus, Ta Chen failed not only to name Anderson as a commissionaire, but also failed to report the commissions it *did* pay to Anderson.

Id. at 3, Def.'s App., Tab 9, at 3 (emphasis in original).

After issuance of the *Final Results*, in which Commerce applied adverse facts available to Ta Chen's sales to Anderson, Ta Chen requested a correction of the Department's treatment of these sales, claiming that the conclusion that Ta Chen sold subject merchandise to Company C during the POR was a ministerial error. *Ministerial Error Submission* (July 24, 1997), at 4, C.R. Doc. 34, Pl.s' Prop. App., Tab P, at 4.[21] Commerce did not, however, alter its conclusion that Ta Chen had misreported its sales to Anderson Alloys and failed to list Anderson as a commissionaire.

DISCUSSION

Ta Chen argues that the conclusion that it misreported sales to Anderson Alloys, and failed to list Anderson as a commissionaire during the POR, is not supported by substantial evidence. Ta Chen insists that Mr. Shieh's comments regarding sales to Company C referred to sales made outside of the POR, and that Mr. Shieh was responding to questions regarding Ta Chen's sales history, not just sales during the POR. The Domestic Interested Parties counter that the verification was carried out to verify Ta Chen's sales information during the POR, so Commerce could legitimately interpret Mr. Shieh's statements as referring to sales which occurred during the POR.

The court agrees with Ta Chen that Commerce's conclusion is not supported by substantial evidence. As stated in the discussion section of Ta Chen's sales to Sun, substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp.*, 340 U.S. at 477. The court does not substitute its own judgment for that of Commerce, but the court will not defer to a decision which is based on "inadequate analysis or reasoning." *USX Corp. v. United States*, 11 CIT 82, 88, 655 F. Supp. 487, 492 (1987) (rejecting analysis of ITC where ITC did not

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[21] The July 24, 1997 submission was a re-submission of Ta Chen's July 17, 1997 submission alleging a ministerial error. Commerce determined that the July 17 submission contained new factual information, and therefore returned the document pursuant to 19 C.F.R. § 353.38(i) (1997). *Commerce Letter Ruling* (July 22, 1997), at 1, P.R. Doc. 103, Def.'s App., Tab 11, at 1. Ta Chen was permitted to resubmit its allegation of ministerial error without referencing the new information. *Id.*

fully analyze the issue). "[T]he absence of information necessary for a thorough analysis may render a determination unsupported by substantial evidence." *Id.* at 95, 655 F. Supp. at 498 (citation omitted).

Commerce's analysis that Ta Chen misreported its sales to Anderson is inadequate. There is no indication from the verification report that Commerce had any concerns regarding Ta Chen sales to Company C with commissions to Anderson. The *Final Results* do not elaborate any reason why the discussion at verification could justifiably lead to the conclusion that Mr. Shieh was referring to POR sales of subject merchandise. *See Final Results*, 62 Fed. Reg. at 37,544.

Mr. Shieh's statement during verification was made in response to questions regarding the history of Ta Chen's sales process. The introductory paragraph to this section of the verification report states that Ta Chen was to be "prepared to discuss the history of Ta Chen's efforts at selling pipe in the United States." *Verification Report*, at 4, Def.'s App., Tab 8, at 4. Mr. Shieh stated that "*there are times* when Ta Chen has sold direct to [Company C]. During such instances, Ta Chen negotiated the price with [Company C]. Ta Chen would then pay Anderson Alloys a commission." *Id.* at 5, Def.'s App., Tab 8, at 5 (emphasis added). This sole statement is not sufficient evidence for a conclusion that Ta Chen misreported its commissions when it was made in the context of Ta Chen's history of its sales in the United States, and where the verification report itself does not indicate that Mr. Shieh's statement was in any way problematic.

Ta Chen also emphasizes that it was provided with no opportunity to clarify Mr. Shieh's statement regarding sales to Company C. Commerce argues that verification is not the time to submit new information. *See Tatung Co. v. United States*, 18 CIT 1137, 1142 n.3 (1994) (court accepted as reasonable "Commerce's position that allowing respondents who failed verification to re-submit new data, and requiring Commerce to reverify this information would impose an undue burden on Commerce."); *see also Chinsung*, 13 CIT at 106, 705 F. Supp. at 601–02 (stating that respondent bears the burden of creating an adequate record). Ta Chen, unlike the respondent in *Tatung*, did not fail verification. Indeed the verification report reflects that the Department did not find discrepancies in TCI's information. By comparison, the Department found "numerous errors and omissions" in the respondent's data during verification in *Tatung*. *Tatung*, 18 CIT at 1138.

As stated in the discussion of Ta Chen's affiliation with Sun, Commerce has an obligation to "put parties on notice as to the deficiencies in their responses." *Usinor Sacilor*, 19 CIT at 745, 893 F. Supp. at 1142. In *Usinor*, Commerce failed to give the plaintiffs notice that information was absent between the issuance of its preliminary and final results. The court held that this rendered Commerce's determination unsupported by substantial evidence and otherwise contrary to law. *Id.* at 745, 893 F. Supp. at 1141. In this case, Commerce's determination in the *Final Results* that Ta Chen had misreported sales to Anderson was a total

surprise to Ta Chen. By failing to provide Ta Chen with an opportunity to comment on this allegation, Commerce based its conclusion on insufficient evidence and reasoning which the court will not uphold.

Given this record, the court concludes that the finding that Ta Chen misreported its sales to Anderson is not supported by substantial evidence. On remand, Commerce must either provide Ta Chen an opportunity to submit evidence on the purported sales to Company C, in order for the Department to make a determination as to whether these sales were made during the POR, or Commerce must disregard the issue of misreported sales and undisclosed commissions to Anderson.

III. Application of adverse facts

Ta Chen contests the Department's application of adverse facts available, pursuant to 19 U.S.C. § 1677e (1994). Commerce applied adverse facts available to Ta Chen's misreported sales, i.e., its sales to Sun and Anderson. *Final Results*, 62 Fed. Reg. at 37,553. It did not base Ta Chen's margin on total adverse facts available, as requested by the Domestic Interested Parties. *Id.* Rather, Commerce applied partial adverse facts.

The Department concluded that an adverse inference was warranted because "Ta Chen failed to provide the Department with a complete and reliable listing of its U.S. sales," and that this amounted to a failure on Ta Chen's part to cooperate to the best of its ability. *Preliminary Results*, 62 Fed. Reg. at 1,436. Commerce stated further in the *Final Results* that, with regard to sales to Anderson, Ta Chen misreported these sales and failed to act to the best of its ability in this regard. *Final Results*, 62 Fed. Reg. at 37,544.

The court need not resolve the issue of whether the application of adverse facts available was warranted, in light of the fact that it is remanding this case to provide Ta Chen an opportunity to provide the Department with information on Sun's US sales and on Ta Chen's sales to Anderson Alloys.[22] Commerce will therefore have to recalculate the dumping margin in light of this information and, depending on Ta Chen's cooperation on remand, may or may not find that an application of adverse facts available is warranted.

IV. Corroboration of the dumping margin

Commerce applied a 31.90 percent margin as partial adverse facts available to Ta Chen's sales to Sun and to Anderson. This margin was the highest rate from the initial LTFV investigation. *Preliminary Results*, 62 Fed. Reg. at 1,436; *see also Certain Welded Stainless Steel Pipe from Taiwan*, 57 Fed. Reg. at 62,301. This resulted in a weighted-average margin of 6.06 percent. *Final Results*, 62 Fed. Reg. at 37,556.

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[22] The court also does not address Ta Chen's argument that the Department may not consider the respondent's level of cooperation in selecting substitute information when it applies partial adverse facts available. Pl.'s Br. at 41. The court does note that it has upheld the application of adverse facts to only a portion of a respondent's data. *See Toyota Motor Sales, U.S.A., Inc. v. United States*, 15 F. Supp.2d 872, 882 (Ct. Int'l Trade 1998); *Ferro Union*, 1999 WL 825584, at *7 (Ct. Int'l Trade Oct. 6, 1999) (application of partial adverse facts available furthered goal of accuracy while maintaining adversity).

Ta Chen argues that Commerce failed to corroborate the margin in accordance with 19 U.S.C. § 1677e(c). In light of the court's instructions to Commerce on remand, however, the court need not determine whether the application of this margin was warranted, nor whether it was properly corroborated. The court also does not address Ta Chen's arguments that the margin was based on aberrant sales. Commerce will calculate a margin for Ta Chen based on its findings pursuant to this remand.

CONCLUSION

The court affirms Commerce's finding that Ta Chen and Sun Stainless are affiliated parties, as based on substantial evidence. Commerce erred, however, in applying facts available. On remand, Commerce will ask Ta Chen to provide information on Sun's US sales. The court also finds that Commerce's decision that Ta Chen misreported its sales to Anderson Alloys was not based on substantial evidence. On remand, Commerce will provide Ta Chen with an opportunity to explain whether the alleged sales to Company C occurred outside of, or during, the POR, or will disregard this issue.

Remand results are due within 60 days. Objections are due 20 days thereafter, responses 11 days thereafter.

NOTE: This is to advise that Slip Op. 99–118 is not available for publication at this time due to the confidential nature of the document. A public version of the document will be released and published in the CUSTOMS BULLETIN when available.

(Slip Op. 99–118)

MANNESMANNROHREN-WERKE AG AND MANNESSMANN PIPE & STEEL CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND GULF STATE TUBE DIVISION OF VISION METALS, DEFENDANT-INTERVENOR

Court No. 98–04–00886

(Dated October 29, 1999)

(Slip Op. 99–119)

UNITED STATES OF AMERICA, PLAINTIFF *v.*
HITACHI AMERICA, LTD. AND HITACHI, LTD. DEFENDANT

Court No. 93–06–00373

(Dated November 3, 1999)

FINAL JUDGMENT

RE: DEFENDANT HITACHI LTD.

MUSGRAVE, *Judge:* This matter having been remanded from the decision of the Court of Appeals of the Federal Circuit in *United States v. Hitachi America, Ltd.*, Nos. 97–1431, 97–1447 and 97–1452, *see* 172 F.3d 1319 (1999), upon consideration of subsequent papers and proceedings and in conformity with said decision, it is

ORDERED that judgment in favor of Hitachi Ltd. against the United States of America be, and it hereby is, entered; and it is further

ORDERED, ADJUDGED AND DECREED that Hitachi Ltd. be, and it hereby is, dismissed with prejudice as a defendant to this action.

(Slip Op. 99–120)

UNITED STATES, PLAINTIFF *v.* JOSEPH ALMANY, D/B/A J.A. IMPORTS, DAVID JORDAN, INC., AND FAR WEST INSURANCE CO., DEFENDANTS

Court No. 96–02–00384

(Dated November 3, 1999)

Frank W. Hunger, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*A. David Lafer, Franklin E. White, Jr.*), for plaintiff.

Joseph Almany, defendant *pro se*.

Law Offices of David K. Geren (*David K. Geren*), for defendant David Jordan, Inc.

MEMORANDUM

MUSGRAVE, *Judge:* Familiarity with the prior proceedings of this case is presumed. Defendants Joseph Almany, d/b/a J.A. Imports and David Jordan, Inc. have judgment by default entered against them for lost duties in the amount of $5,016.87, plus interest, payable to the United States Customs Service, resulting from a violation of 19 U.S.C. § 1592. *See* Slip Op. 98–72 (June 3, 1998). The United States has moved for clarification or modification of the Judgment to encompass fraudulent culpability against defendants, arguing that certain requests for admissions were deemed "conclusively established" by reason of defen-

dants' failure(s) to respond thereto and this Court's Order of January 13, 1997. Relevant portions of those requests read as follows:

Request for Admission No. 2:
During the years 1989 through 1991, Joseph Almany was the owner, president, and sole proprietor of J.A. Imports, and directed the activities of that business.

Request for Admission No. 3:
During the year 1991, J.A. Imports imported and distributed merchandise provided to it by Harbour City Trading Company.

Request for Admission No. 4:
During the years 1989 and 1991, J.A. Imports imported and distributed merchandise provided to it by First Union Enterprises Company.

Request for Admission No. 5:
During the years 1989 and 1991, J.A. Imports imported and distributed merchandise provided to it by the Hongsinga Watch Co. Ltd.

Request for Admission No. 6:
With respect to * * * [twelve] Customs entries * * * (identified in Exhibit A to plaintiff's complaint) Hongsinga Watch Co. Ltd. provided J.A. Imports with two different invoices for the merchandise entered by J.A. Imports.

Request for Admission No. 7:
With respect to each of the entries identified in Request for Admission No. 6 above, one of the two invoices Hongsinga Watch Co. Ltd. provided J.A. Imports stated a purchase price for the merchandise entered by J.A. Imports which was *lower* than the actual purchase price paid by J.A. Imports for that merchandise.

Request for Admission No. 8:
With respect to each of the entries identified in Request for Admission No. 6 above, one of the two invoices Hongsinga Watch Co. Ltd. provided J.A. Imports stated a purchase price for the merchandise entered by J.A. Imports which reflected the actual purchase price of the merchandise and which was *higher* than the purchase price stated on the other invoice.

Request for Admission No. 9:
With respect to each of the entries identified in Request for Admission No. 6 above, J.A. Imports used the invoice provided by Hongsinga Watch Co. Ltd. which reflected the *lower* purchase price rather than invoice provided by Hongsinga Watch Co. Ltd. which reflected the *higher* purchase price as the basis for the declaration of the value of the merchandise to the U.S. Customs Service.

Request for Admission No. 10:
With respect to each of the entries identified in Request for Admission No. 6 above, Joseph Almany and J.A. Imports knew that, by reporting to Customs the lower price listed in one of the two invoices provided by Hongsinga Watch Co. Ltd., J.A. Imports would pay a lower amount in duties than it would have to pay if Joseph Almany and J.A. Imports had declared to Customs the price listed in

the higher priced invoice provided by Hongsinga Watch Co. Ltd. with respect to the same entry.

Request for Admission No. 11:

With respect to each of the entries identified in Request for Admission No. 6 above, by relying upon the lower priced invoice provided by Hongsinga Watch Co. Ltd. as the basis of the declaration of the value of the merchandise to Customs, J.A. Imports paid lower duties than the amount required by law.

Request for Admission No. 12:

With respect to each of the entries identified in Request for Admission No. 6 above, J.A. Imports reported to Customs a value for the merchandise covered by the entry that was lower than the actual purchase price and did so with an intent to deceive.

* * * * * * *

Request for Admission No. 27:

David Jordan, Inc. is the same entity formerly known as J.A. Imports.

Request for Admission No. 28:

Admit the genuineness of Exhibit 1 * * * as a true and correct copy of the RIDER [to Customs' Form 301] NAME CHANGE OF PRINCIPAL executed on April 17, 1993, on behalf of J.A. Imports [and naming David Jordan, Inc. as principal "responsible for any act secured by this bond under principal's former name."]

* * * * * * *

Plaintiff's Motion for a Court Order Stating that Plaintiff's First Set of Requests for Admissions to Defendants Joseph Almany d/b/a J.A. Imports and David Jordan Inc. Are Admitted Pursuant to Rule 36(a), Exhibit 1 (and "Exhibit 1" attached thereto) (emphasis in original). Requests for Admission 13–19 and 20–26 followed the pattern established in 6–12 with respect to five entries supported by invoices purportedly prepared by First Union Enterprises Company and six entries supported by invoices purportedly prepared by Harbour City Trading Company, respectively.

Joseph Almany's "response" to the government's motion states merely:

> Acting on my own behalf, I hereby respond to [chamber's] letter dated April 22, 1999 and I am willing to pay the sum of $5,016.87 in order to satisfy the judgment entered on June 6, 1998 in regards to case or court #96–02–00384 United States of America vs. Joseph Almany, J.A. Imports and Far West Insurance Company.
>
> Be it my understanding and condition, however, that no other amount such as interest will be added to said $5,016.87. As you are probably aware, the case has been dragging on for almost 10 years. This payment would also close this matter once and for all and will therefore release me and/or any other defendant of any further liability relying [*sic*] to this case.

An individual may choose representation *pro se*, however a corporation must be represented by an attorney admitted to the bar of the court. CIT

Rules 75(a),(b)(1). There has been no response to date from counsel for David Jordan, Inc., although a response was ordered and ample time allowed. *See* Slip Op. 99–77 (Aug. 9, 1999); *cf.* Slip Op. 98–66 (May 19, 1998).

The Court anticipated the government's reply: that the amount of duties Mr. Almany states he is now "willing" to pay, without interest, is less than the amount he has been ordered to pay, that the customs duties owed remain unpaid, and that the civil penalty of $413,138.00 imposed by the U.S. Customs Service for fraudulent violations of 19 U.S.C. § 1592 has not been paid.

> This Court ought not to countenance Mr. Almany's audacity in suggesting that the Government settle the entire case against all defendants (including the lawful penalty of $413,138.00 for fraudulent violations of 19 U.S.C. § 1592 sought in the complaint) merely to receive a payment that this Court ordered Mr. Almany to pay more than a year ago. Rather, in accordance with its June 3, 1998 Order, this Court should *again* order Mr. Almany to pay the customs duties owed, *plus interest*, by a check payable to the "United States Treasury" and mailed to counsel for plaintiff. Further, this Court should hold that the defendants Joseph Almany d/b/a J.A. Imports and David Jordan, Inc. are jointly and severally liable for payment of a civil penalty, resulting from their *fraudulent* violations of 19 U.S.C. § 1592, in an amount to be determined in further proceedings.

Plaintiff's Reply at 3 (emphasis in original).

Slip Op. 99–77 countenanced only due administration of justice. Mr. Almany's response provides no basis for denying the government's motion. Judgment will enter accordingly.

(Slip Op. 99–121)

UNITED STATES OF AMERICA, PLAINTIFF *v.*
HITACHI AMERICA, LTD. AND HITACHI, LTD., DEFENDANT

Court No. 93–06–00373

[On remand from a decision of Court of Appeals for the Federal Circuit, assessment of civil penalty against Hitachi America, Ltd.]

(Dated November 5, 1999)

David W. Ogden, Acting Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *(James W. Poirier, Cynthia B. Schultz,* and *Lesleyanne Kessler);* of counsel: *Judith L. Altman, Colleen M. Piccone* and *Alan C. Cohen,* United States Customs Service, for plaintiff.

Weil, Gotshal & Manges LLP (John R. Wing, Yoav M. Griver and *Tillie Lim)* for defendant Hitachi America, Ltd.

Kirkland & Ellis (William A. Streff, David G. Norrell, Eugene F. Assaf, and *Paul F. Brinkman)* for defendant Hitachi, Ltd.

MEMORANDUM OPINION

MUSGRAVE, *Judge:* Previously, this Court found Hitachi America Ltd. ("HAL") and Hitachi, Ltd. ("Hitachi Japan") negligent with respect to the declared dutiable value(s) of 41 entries of 120 subway cars and parts imported between June 16, 1984 and May 27, 1987 for use by the Metropolitan Atlanta Rapid Transit Authority ("MARTA"). *United States v. Hitachi America, Ltd.*, 21 CIT ___, 964 F.Supp. 344 (1997). The decision was appealed. In *United States v. Hitachi America, Ltd.*, 172 F.3d 1319 (Fed.Cir. 1999), the Court of Appeals for the Federal Circuit ("CAFC") *inter alia* reversed judgment on Hitachi Japan and affirmed that HAL was negligent in declaring the dutiable transaction in US dollars rather than yen, but noted that the penalty had been assessed on "domestic transaction value (based on dollars) rather than on * * * import transaction value (based on yen)". 172 F.3d at 1335. The case has therefore been remanded for further proceedings. Although the CAFC affirmed a finding of negligence and the assessment of a penalty against HAL, its decision requires the government to "bear the costs of HAL and Hitachi Japan as well as its own costs." 172 F.3d at 1338. Since then, Slip Op. 99–119 (Nov. 3, 1999) entered judgment in accordance with the CAFC's decision for Hitachi Ltd. This memorandum addresses the amount of the civil penalty against HAL and presumes familiarity with the decisions on the case.

19 U.S.C. § 1592(c)("Maximum penalties") states that negligence is punishable by the lesser of the domestic value of the merchandise or twice the "lawful duties". Either case requires a proper determination of the "price actually paid or payable" for imported merchandise. *See* 19 U.S.C. § 1401a(b)(1). The Court's prior opinion, 21 CIT at ___, 964 F.Supp. at 351, described MARTA's public contract ("CQ–311") with the importing joint venture, consisting of HAL (the importer of record) and C. Itoh America ("CIA"), and also the government's concern regarding payment of "economic price adjustment" ("EPA") and "monetary value adjustment" ("MVA") clauses on the price actually paid or payable for the imported subway cars and parts. EPA payments address the risks of labor and material cost inflation. MVA payments cover the risk of currency exchange rate fluctuation. MARTA agreed to absorb both risks. CQ–311 therefore required MVA payments at a yen/dollar rate fixed as of the "Base Contract Award" (*i.e.*, ¥269.7:$1.00) and calculation of EPA on foreign labor and EPA on foreign material by reference to certain statistics published by Japan's Ministry of Labor and The Bank of Japan. *See* Government's Exhibit 1754, Articles 65 and 59, respectively. MVA and EPA thus provided certainty to the supplier's income stream.

Under CQ–311's terms, MARTA could choose to pay foreign labor and material costs in US dollars or in yen at the rate of ¥269.7:$1.00. The invoices to MARTA itemized those payment obligations as required. MARTA chose to make all foreign-source payments to HAL/CIA in US

dollars and in accordance with the invoices received[1]. CIA, acting as a banker, exchanged an amount equivalent to these dollars for yen at the rate of ¥269.7:$1.00 (except for EPA payments, which it converted at the rate of ¥268.835:$1.00, a difference of ¥0.865 or 0.0032%), and remitted yen corresponding to MARTA's payments to its parent, C. Itoh Japan ("CIJ"). Separately, Hitachi Japan, the manufacturer, invoiced CIJ for payment in yen corresponding to the contract amounts MARTA was obligated to pay HAL/CIA, albeit in amounts corresponding to the rate of exchange of ¥268.7 for each $1.00 of payment expected from MARTA. That is, Hitachi Japan's invoices evince the understanding that CIJ provided 1 yen of value for each dollar transacted[2]. *See* Government's Exhibit 1763.

The government proffered the amount of "lost" duties via audit of MARTA's EPA and MVA payments based on HAL's records. Government's Exhibit 1605. Mr. John Kessler conducted the work of the audit and was supervised by Mr. Eugene Donohue. Mr. Kessler's working papers were admitted into evidence as Exhibits 1618A. One of Mr. Kessler's working papers[3] consisted of separate EPA or MVA amounts listed in US dollars by check number and paid by MARTA. None of these payments were tied to specific entries. Total EPA for foreign labor and materials and foreign MVA amounted to $2,816,588, (–$877,591), and $18,509,992, respectively, hence Customs determined total "undervaluation" of $20,448,989. The applicable duty rate varied during the time in issue between 4.75% and 4.10% from year to year: as applied to each payment liability, the process revealed $851,455.32 in "lost revenue" to Customs. These results were reported to HAL on December 12, 1990. Thereafter, Customs increased "lost revenue" to $947,854 according to additional importation information which revealed $2,317,295 in additional undervaluation. This amount derived entirely from MVA invoices (including one for $2,040,933 disputed by MARTA[4]) and was reported on November 28, 1994.

Counsel for the defendants argued that the appropriate transaction value in this instance was between Hitachi Japan and CIJ. However, they introduced only evidence of HAL/CIA-to-CIJ payments during cross-examination of Mr. Donohue. At the government's request, in advance of trial, Mr. Donohue had prepared an alternative analysis of the stream of payments from the United States to Japan. This involved al-

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[1] Except as to the last invoice. *See infra*, footnote 4.

[2] As a random example, for fulfilling a base-buy milestone D event, HIA/CIA billed MARTA $286,740. Of this amount, the payment records reflect ¥24,746,809 remitted from CIA to CIJ, whereas Hitachi Japan invoiced CIJ for ¥24,499,065. *See* Government's Exhibit 1763 at 1799 and supporting documentation.

[3] "Analysis of Billings/Payments for Foreign EPA and Foreign MVA Under Contract CQ–311", *see* Government's Exhibit 1618A.

[4] With respect to the disputed invoice, Customs' report states:

> It is noted that there was a subsequent net settlement for $1,200,000 which considered both this disputed MVA liability[ ] as well as various other unrelated credits claimed by MARTA for late delivery, delays in invoicing, failure to deliver operating maintenance manuals, etc. This settlement did not itemize the agreements reached on the various elements involved therein. In order to protect the revenue of the United States Government, we have considered the $2,040,933 MVA liability as being paid.

Government's Exhibit 1617, Exhibit A, Note 9. Apparently Hitachi Japan received from CIJ the yen amount it expected, *i.e.*, as invoiced by HAL/CIA, irrespective of the settled amount.

location to each entry of yen remitted from HAL/CIA to CIJ based on the number of cars entered. In his latest set of figures, Mr. Donohue allocated ¥98,467,086 to each of the 30 "base buy" cars and ¥97,162,909 to each of the 90 additional cars, a total of ¥11,698,674,390. This was the amount of yen purportedly remitted from HAL/CIA to CIJ. The amount is apparently net of MVA payments, as compared with a yen translation of the government's audit figures. Conversion of these allocations into US dollars based on dates of exportation[5] produced "gross recomputed dutiable value" of $58,514,547, undervaluation of $18,226,336, and "loss of revenue" of $750,138.40. Mr. Donohue further revised these figures to exclude ocean freight and insurance costs (directly described, and allocated, in US dollars) of approximately $442,182 for the 30-car base buy and $2,315,048 for the 90-car options. *See* Defendants' Exhibit 535; Trial Transcript of June 5, 1996, lines 171–20 to 172–12, 192–20 to 192–25. The revised revenue loss amount according to this methodology was $632,102.23.

The government viewed the audit of MARTA's dollar payments, including MVA, as indicative of the lawful transaction value of the merchandise in accordance with 19 U.S.C. § 1401a(b)(1). The defendants urged acceptance of the HAL/CIA-to-CIJ duty figure. The prior opinion of this Court did not regard the CIJ "sale" to HAL/CIA as at "arm's length" and therefore found the government's proffered methodology acceptable, although in dollars and adjusted to account for the applicability of the statute of limitations as to 21 entries. 21 CIT ____, 964 F.Supp. at 381. The CAFC disagreed, finding

> [t]he sole dispute [to be] over which sales transaction must be used as a basis for calculating the penalty. The three available transactions are (1) the sale from Hitachi Japan to CIJ in Japan; (2) the sale from CIJ in Japan to the HAL/CIA joint venture in the U.S.; and (3) the sale between the joint venture and MARTA within the U.S. The value of the second sale, the import transaction value, was $632,102 (based on yen). The value of the third sale, the domestic transaction value, was $947,854 (based on dollars).

172 F.3d at 1335.

The first sale was not found applicable since there was observed agreement among the parties "that the correct transaction for penalty calculation purposes is the sale from CIJ to HAL/CIA". 172 F.3d at 1335. The CAFC therefore instructed use of that import transaction value in assessing the penalty. It is perhaps worth observing, however, that the presence of true MVA payments indicates a transaction is foreign-currency based. If a transaction is truly US dollar-based, there is no need for MVA. Since MVA payments are irrelevant to the perspective of this foreign currency-based valuation (with which the CAFC agrees, 172 F.3d at

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[5] *See* 31 U.S.C. § 5151. This required conversion into dollars at the quarterly rate published by the Secretary of the Treasury for the quarter in which the merchandise had been exported unless no such rate had been published or if the published value published varied by at least 5 percent from a value measured by the buying rate at noon on the day the merchandise is exported, in which case the conversion was to have been made at the applicable "buying rate" on the day of export.

1332), and since the evidentiary record confirms that "CIA did not send additional payments to CIJ for MVA receipts", 21 CIT at ___, 964 F.Supp. at 358, the penalty is therefore assessed in accordance with 19 U.S.C. § 1592(c)(3)(A)(ii) at twice the import transaction value of the result of the government's alternative methodology, or $1,264,204.46.

Judgment will enter accordingly.

(Slip Op. 99–122)

RANCHERS-CATTLEMEN ACTION LEGAL FOUNDATION, ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND CONFEDERACIÓN NACIONAL GANADERA, DEFENDANT-INTERVENOR

Court No. 99–02–00103

Plaintiffs, Ranchers-Cattlemen Action Legal Foundation, move, pursuant to Rule 56.2 of the Rules of this Court, for Judgment Upon An Agency Record challenging the negative preliminary injury determination concerning live cattle from Mexico of the United States International Trade Commission (ITC) in *Live Cattle from Canada and Mexico*, 64 Fed. Reg. 3716 (Jan. 25, 1999). Plaintiffs primarily argue that the ITC misinterpreted the "compete[s] with" language in the cumulation provision under 19 U.S.C. § 1677(7)(G)(i) (1994), the ITC's determination not to cumulate cattle from Mexico and Canada was not supported by clear and convincing evidence on the record, and the ITC's negative preliminary injury determination was not based on clear and convincing evidence on the record.

Defendant, United States International Trade Commission, and defendant-intervenor, Confederación Nacional Ganadera, oppose plaintiffs' motion arguing the ITC's determination not to cumulate and the ITC's negative injury determination were based on clear and convincing evidence and therefore were not arbitrary or capricious.

Held: Plaintiffs' Motion for Judgment Upon An Agency Record is denied. The ITC's negative preliminary injury determination is sustained. Accordingly, the action is dismissed.

(Dated November 5, 1999)

Stewart and Stewart (Terence P. Stewart, James R. Cannon, Jr. and *Eric P. Salonen)*, Washington, D.C., for plaintiffs.

Lyn M. Schlitt, General Counsel, U.S. International Trade Commission; *James A. Toupin*, Deputy General Counsel, U.S. International Trade Commission *(Robin L. Turner)*, Washington, D.C., for defendant.

Shearman and Sterling (Thomas B. Wilner, Jeffrey M. Winton and *Perry S. Bechky)*, Washington, D.C., for defendant-intervenor.

OPINION

CARMAN, *Chief Judge:* Pursuant to Rule 56.2 of the Rules of this Court, plaintiffs, Ranchers-Cattlemen Action Legal Foundation (R-CALF), move for Judgment Upon An Agency Record. Plaintiffs contest the negative preliminary injury determination concerning live cattle from Mexico of the United States International Trade Commission (ITC or Commission) in its investigation in *Live Cattle from Canada and Mexico*, 64 Fed. Reg. 3716 (Jan. 25, 1999). This Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (1988).

BACKGROUND

On November 12, 1998[1], plaintiffs, R-CALF, filed petitions with the ITC and the United States Department of Commerce alleging that the U.S. cattle industry was materially injured by reason of subsidized imports of live cattle from Canada and by reason of less than fair value imports of live cattle from Canada and Mexico. In response to the plaintiffs' petition, the ITC conducted preliminary investigations into these matters.

On January 19, 1999, the Commission reached a negative preliminary injury determination with respect to less than fair value imports from Mexico. The ITC's negative determination regarding Mexican cattle and a public version of its staff report are set forth in *Live Cattle from Canada and Mexico*, USITC Pub. 3155, Invs. Nos. 701–TA–386 (Prelim.) and 731–TA–812–813 (Prelim.) (Feb. 1999) (*Live Cattle from Mexico*). The ITC made affirmative preliminary determinations in the investigations concerning live cattle from Canada, and plaintiffs do not appeal from those determinations.

The imports at issue here concern live cattle from Mexico. There are, in general, three developmental stages for cattle prior to slaughter: (1) calves, which are raised and then weaned from their mothers at five to ten months; calves weigh up to 400–650 pounds; (2) yearling/stocker cattle, which have been weaned from their mothers and are fed on forage and roughage feeds or grazed on pasture until they are about 12–20 months old; yearling/stocker cattle generally weigh between 400 to 650–750 pounds; and (3) feeder cattle, which are kept in confined areas for 90 to 150 days and fed on finishing and high-energy rations; feeder cattle weigh up to 1,100 to 1,300 pounds. Once the cattle are sufficiently fed, they are considered fed, fat, or slaughter cattle. Fed, fat, and slaughter cattle are cattle ready for immediate slaughter.[2]

In making its preliminary injury determination concerning live cattle from Mexico, the ITC considered, among other things, issues regarding domestic like product, domestic industry, cumulation, conditions of competition, and reasonable indication of material injury or threat of material injury by reason of the subject imports from Mexico. In consideration of the domestic like product determination, the ITC considered whether live cattle in the primary stages of development should be de-

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[1] Plaintiffs, Ranchers-Cattlemen Action Legal Foundation (R-CALF), initially filed petitions with the United States International Trade Commission (ITC or Commission) and the United States Department of Commerce alleging that the U.S. cattle industry was materially injured by reason of subsidized imports of live cattle from Canada and by reason of less than fair value imports of live cattle from Canada and Mexico on October 1, 1998. On November 10, 1998, R-CALF withdrew the October 1, 1998 petitions, and the ITC discontinued the investigations. *See Live Cattle from Canada and Mexico*, USITC Pub. No. 3155, at I–1 n.1, Invs. Nos. 701–TA–386 (Prelim.) and 731–TA–812–813 (Prelim.) (Feb. 1999) (*Live Cattle from Mexico*). On November 12, 1998, R-CALF re-filed their petitions for investigations which resulted in the institution of the Commission's investigations in the above-mentioned matter. *See id.* at I–1. The period of investigation appears to have been from 1995 through October 1998. *See id.* at 14 n.76 (citing Table IV–2).

[2] The parties appear to agree substantially to the above-mentioned definitions concerning the primary stages of cattle development. (*See* Plaintiffs' Answers to Questions by the Court in Re: *R-CALF v. United States*, Court No. 99–02–00103 (Plaintiffs' Answers to Questions by the Court), Memorandum of Points and Authorities in Support of R-CALF's Motion for Judgment Upon the Agency Record (Plaintiffs' Mem.) at 5–6, Defendant's and Defendant-Intervenor's Joint Response to the Written Questions Presented by the Court at the Rule 56.2 Hearing and Joint Comments on the Court's "Schedule of Plaintiffs' Alleged Factual Errors by the ITC" (Def.'s and Def.-Int.'s Jt. Resp. to the Court), and Defendant United States International Trade Commission's Memorandum in Opposition to Plaintiffs' Motion for Judgment Upon the Agency Record at 23–24.)

fined as separate domestic like products from the cattle at more advanced stages of development. The ITC used a semifinished like product analysis[3] to determine whether the cattle at earlier stages of development are "like" the cattle at more advanced stages of development.

Applying the semifinished like product analysis, the ITC determined that cattle at each stage of development are dedicated to progression to the next stage and will ultimately develop into fed cattle ready for slaughter. Thus, cattle have no independent use or function other than being slaughtered. The ITC found, however, that cattle at different stages of production are not functionally or economically interchangeable since at each stage prior to their final stage, they have not reached their slaughter weight. Moreover, the ITC found that while some operations raise cattle from birth until they are ready for slaughter, it is more common for cattle to be sold at various stages of development. Based on these facts, the ITC defined the domestic "like product" as encompassing all stages of development for live cattle.

In determining the scope of the domestic industry, the ITC found that the domestic industry consists of all U.S. production of the domestic like product, live cattle.

In determining whether to assess cumulatively the volume and effect of imports from Mexico with the imports from Canada pursuant to 19 U.S.C. § 1677(7)(G)(i) (1994)[4], the ITC considered whether the imports competed with each other and with the domestic like product[5] in the United States. To determine whether the imports competed with each other, the ITC applied its traditional four-factor test: (1) the degree of fungibility between the imports from the two countries; (2) the presence of sales or offers to sell imports in the same geographic market from the two countries; (3) the existence of common or similar channels of distribution for imports from the two countries; and (4) whether the imports from the two countries were simultaneously present in the market.

In regard to the first factor, the ITC found there was not a sufficient degree of fungibility between the imports from Canada and Mexico. Based on measurement by weight, the ITC found that virtually all subject imports from Canada (95.4 percent by weight) in 1997 weighed over 320 kilograms, or more than 704 pounds, primarily fed cattle ready for immediate slaughter. In contrast, virtually all imports from Mexico (96 percent by weight) in 1997 weighed between 90–320 kilograms, or

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[3] The semifinished product analysis requires the ITC to examine five factors: (1) whether the upstream article is dedicated to the production of the downstream article or has independent uses; (2) whether there are perceived to be separate markets for the upstream and downstream articles; (3) differences in the physical characteristics and functions of the upstream and downstream articles; (4) differences in the costs or value of the vertically differentiated articles; and (5) significance and extent of the processes used to transform the upstream into the downstream articles. *See, e.g., Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Germany and Japan*, USITC Pub. 2988, at 6 n.23, Invs. Nos. 731–TA–736 and 737 (Final) (Aug. 1996).

[4] The statute states, in pertinent part, "the Commission shall cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which * * * petitions were filed * * * on the same day * * * if such imports compete with each other and with domestic like products in the United States market." 19 U.S.C. § 1677(7)(G)(i) (1994).

[5] The ITC's determination concerning whether the imports of live cattle from Mexico and Canada competed with the domestic like product is not at issue in this case, and, therefore, will not be discussed in this opinion.

198–704 pounds, primarily at the calf or yearling/stocker stages of development. The ITC found the live cattle that have not been fed to slaughter weight are not substitutes for cattle ready for slaughter. As the Commission found cattle in different stages of production are poor substitutes for each other, the ITC determined imports from Canada and Mexico were poor substitutes for each other. Further, the ITC found the cattle imported from Canada were more likely to be British breeds that are likely to produce higher-priced prime and choice quality grade meats. Cattle imported from Mexico, however, were usually Brahman or Brahman cross-breeds which were less likely to produce prime or choice-grade meats. For the reasons stated above, the ITC found limited fungibility existed between the imports of live cattle from Canada and Mexico.

In regard to factor two, geographic overlap, the Commission found there was limited overlap between the markets for the imports from Canada and Mexico. The majority of the subject imports from Mexico entered into four states: Texas, California, New Mexico, and Arizona. The majority of the subject imports from Canada entered into five states: Washington, Utah, Nebraska, Colorado, and Minnesota. The imports from Canada and Mexico overlapped in only five states. Therefore, the ITC found there was limited geographic overlap between the markets for the subject imports from Canada and Mexico.

In regard to factor three, channels of distribution, the ITC found the channels of distribution for the imported cattle depended on the stage of development at purchase. The primary channels of distribution for imports from Mexico were stocker/yearling operators. The primary channels of distribution for imports from Canada were slaughterhouses or packers. Thus, the ITC found there was an insufficient degree of overlap among the channels of distribution to support a finding of competition between the subject imports.

In regard to factor four, simultaneous presence in the U.S. market, the ITC determined live cattle from Mexico and Canada were simultaneously present in the U.S. market during the period of investigation. Based on the above factors, the ITC found the subject imports from Canada and Mexico did not compete with each other, and, therefore, the ITC decided not to cumulate the imports.

In the preliminary injury determination, the ITC found there was no reasonable indication of material injury of the domestic industry by reason of the subject imports from Mexico. The ITC found that the volume and market share of the imports from Mexico were too small throughout the period of investigation to significantly affect the domestic price pursuant to 19 U.S.C. § 1677(7)(C)(ii) (1994)[6]. Specifically, the ITC found,

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[6] 19 U.S.C. § 1677(7)(C)(ii) (1994) states, in relevant part,

> In evaluating the effect of imports of such merchandise on prices, the Commission shall consider whether—
>
> (I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and
>
> (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

"[t]he volume and market share of the[] [Mexican] imports [were] declining and [were] at historical low levels." *Live Cattle from Mexico* at 24. Moreover, the prices for the cattle at the stocker and feeder stages of development in the United States "increased from 1996 to 1998." *Id.* Thus, the ITC found the small and decreasing volume and market share of imports from Mexico had not had a significant adverse impact on the domestic industry. The ITC attributed any weak performance in the domestic industry to the fact that the domestic industry was in the liquidation phase of the cattle cycle during the period of investigation.

Additionally, the ITC found there was no reasonable indication that the domestic industry was threatened with material injury by reason of the subject imports from Mexico. The volume of imports from Mexico was small and decreasing over the period of investigation, and there was no indication of excess production capacity in Mexico which could further the likelihood of an increase in imports from Mexico. Moreover, the ITC found no other adverse trends in relation to the imports from Mexico. The ITC determined, therefore, that there was no reasonable indication of threat of material injury by reason of the subject imports from Mexico.

CONTENTIONS OF THE PARTIES

A. *Plaintiffs*

Plaintiffs, R-CALF, first argue that the ITC misconstrued the cumulation provision of 19 U.S.C. § 1677(7)(G)(i). Plaintiffs contend that the ITC equated "competition" with product "fungibility," "thereby foreclosing from consideration other evidence of competition between imports." (Memorandum of Points and Authorities in Support of R-CALF's Motion for Judgment Upon the Agency Record at 16 (Plaintiffs' Mem.).) Consequently, plaintiffs allege, the ITC never took into account facts which showed a reasonable degree of overlap of competition existed between the imports from Mexico and Canada.

Plaintiffs argue that the high standard the ITC used for determining whether the imports from Canada and Mexico compete is contrary to the statute and Congressional intent. According to plaintiffs, the language of the statute merely requires that the products imported from various countries "compete with" each other, not that they be directly interchangeable upon importation. Further, plaintiffs argue, the legislative history makes it clear that "competition" can exist on many levels and that Congress intended cumulation to be applied broadly in "'an effort to make the application of the injury analysis more realistic * * *.'" (Plaintiffs' Mem. at 24 (emphasis omitted) (quoting H. REP. NO. 100–40, Part I, 100th Cong., 1st Sess. (1987) at 130).) In contrast, plaintiffs argue, the ITC's construction of the law here limits the analysis as to whether imports are fungible upon entry. Such a narrow interpretation, plaintiffs contend, is erroneous and not subject to deference by the Court. Moreover, such a narrow interpretation of the statutory language is contrary to the statutory scheme as a whole.

Plaintiffs also argue that the ITC departed from long-standing agency practice of cumulating finished and unfinished products when it failed to cumulate the subject imports. Plaintiffs argue the ITC has routinely cumulated imports from multiple countries where imports from one country have entered the United States at a different stage of development or production than imports from another country but where both products were intended for the same end use. The ITC's abrupt and unexplained departure from prior ITC practice regarding cumulating finished and unfinished products, according to plaintiffs, was arbitrary and capricious and an abuse of discretion.

Plaintiffs additionally argue that the ITC inappropriately used a different and more rigorous standard of interchangeability for cumulation than it used to define like product. Plaintiffs point to comments from two Commissioners and at least one judicial opinion from this Court to support their argument that the application of different standards of interchangeability for cumulation and like product is in error. Due to this arbitrary application of different standards of interchangeability, plaintiffs argue, the ITC's determination must be reversed.

Plaintiffs also argue that the agency's finding that imports from Canada and Mexico do not compete is not supported by clear and convincing evidence. First, plaintiffs argue the ITC's decision not to cumulate because of the insufficient fungibility of imports is contrary to the ITC's past practice. According to plaintiffs, "the ITC has never declined to cumulate imports in a preliminary injury investigation due to inadequate fungibility." (Plaintiffs' Mem. at 32 (emphasis omitted).) Plaintiffs argue because the ITC has never declined to cumulate by reason of inadequate fungibility, the ITC's decision in this case goes against long-established agency practice.

Second, plaintiffs argue, the ITC's finding regarding cumulation rests on erroneous statements of fact and therefore does not comply with the clear and convincing evidence standard required for preliminary determinations. According to plaintiffs, the ITC erred in concluding "'there appears to be no direct relationship between the prices for stocker/feeder cattle * * * and fed cattle ready for slaughter,'" (Plaintiffs' Mem. at 34 (quoting *Live Cattle from Mexico* at 24–25)), as there is evidence to the contrary.[7]

Plaintiffs further contend the ITC erred in concluding that "'the purchasers, and thus the channels of distribution, vary depending on the stage of [development of the cattle].'" (Reply to Opposition of Defendant and Defendant-Intervenors to Plaintiffs' Motion for Judgment Upon the Agency Record (Plaintiffs' Reply) at 3 (brackets in original) (quoting *Live Cattle from Mexico* at 14).) Such a statement is erroneous, plaintiffs

[7] The Court recognizes that this alleged error appears in the material injury section of the ITC's determination as published in *Live Cattle from Mexico* rather than in the cumulation section. The Court, however, places this argument as it appears in plaintiffs' memorandum of law. (*See* Plaintiffs' Mem. at 34.) The issue is additionally addressed in the material injury discussion of plaintiffs' contentions as plaintiffs also raise the issue under the material injury section of their reply brief. (*See* Reply to Opposition of Defendant and Defendant-Intervenors to Plaintiffs' Motion for Judgment Upon the Agency Record at 20.) The Court addresses plaintiffs' price contention under the material injury section of this opinion only.

allege, as there is evidence to the contrary. Specifically, there is evidence in the record that "*feedlots* may acquire *stocker cattle* as well as *feeder cattle* and that *packers* (i.e., the slaughterhouses) may acquire *feeder cattle* as well as *fed cattle* ready for slaughter." (Plaintiffs' Reply at 3.) As there is evidence that some purchasers acquire cattle at more than one stage of development, plaintiffs argue, the ITC's premise is factually wrong and its conclusion reversible error.

An additional factual error, according to plaintiffs, concerns the ITC's analysis of the geographic overlap of imports. According to the ITC, "[i]mports of Canadian and Mexican cattle overlap in only five states (Colorado, Indiana, Kansas, Nebraska, and Texas)." *Live Cattle from Mexico* at 13. According to plaintiffs, the ITC committed error in finding imports from Mexico and Canada overlapped in Indiana, rather than in Idaho. Plaintiffs argue the misidentification of Indiana is not a "harmless" error because, unlike Indiana, Idaho borders Canada. Thus, the ITC's analysis regarding geographic overlap was in error.

Third, plaintiffs argue, the ITC's determination regarding cumulation lacks sufficient thoroughness, reflects uncertainty, and betrays fundamental misunderstandings about the industry. The agency's cumulation determination, therefore, is not supported by clear and convincing evidence and should be reversed and remanded. Specifically, plaintiffs argue the ITC failed to appreciate the national nature of the U.S. cattle market and therefore did not recognize the potential impact any geographic overlap among the imports from Canada and Mexico might have had on the national market. Further, the agency did not recognize the significance of the states in which the imported cattle overlap. According to plaintiffs, the overlapping states cited by the ITC account for seventy-one percent of total cattle on feed in the United States. Further, plaintiffs argue, the ITC failed to thoroughly analyze the overlap of imports of stocker and feeder cattle from the importing countries, as the Commission parsed the imports of stocker and feeder cattle by weight instead of by head count. Given the nature of the ITC's analysis in this case, plaintiffs contend, the decision should be reversed and remanded.

Additionally, plaintiffs argue the ITC's negative preliminary injury determination, including considerations of import volume, price, and impact, failed to satisfy the clear and convincing standard and therefore was contrary to law. Concerning the volume of imports, plaintiffs contend the ITC focused erroneously on the decline in imports from 1995. Rather, plaintiffs argue, the ITC should have focused on the dramatic increase in imports from Mexico between the second and third years of the period of the investigation. Plaintiffs argue that as the ITC admits "'even relatively small volumes' of imports 'can have significant price effects in this price-sensitive market,'" it should have taken into account the rapid increase in imports from Mexico from 1996 to 1997. (Plaintiffs' Mem. at 46 (quoting *Live Cattle from Mexico* at 20).)

Concerning price, plaintiffs argue in their reply brief the ITC concluded in error that "'there appears to be no direct relationship between the prices for stocker/feeder cattle * * * and fed cattle ready for slaughter.'" (Plaintiffs' Reply at 20 (quoting *Live Cattle from Mexico* at 24–25).) This statement was erroneous, assert plaintiffs, because there was unrebutted evidence to the contrary. Such evidence included testimony that low fat cattle prices were depressing prices for stocker and feeder cattle and that the price of yearling/stocker cattle was a direct function of the cost of feed and the rate of fat cattle. Further, economic analysis showed there was a direct effect of imported feeder cattle on the price of feeder and fat cattle in the U.S. as well as a direct effect of imports of fat cattle on fat and feeder prices in the United States. Therefore, plaintiffs contend, the assumption that prices at different stages of development are not related is factually wrong.

Also concerning price, plaintiffs contend that the Commission incorrectly relied on the absence of evidence of underselling by imports from Mexico whereas it discounted the evidence regarding the presence of underselling by imports from Canada. Moreover, plaintiffs point out that the ITC focused on two different time periods in its analysis of trends in import volumes and prices. According to plaintiffs, the ITC focused on the overall change in import volumes from 1995 to 1997 and on domestic prices between 1996 and 1998. Plaintiffs argue the use of different time periods is arbitrary and capricious. Plaintiffs also point to evidence which appears to contradict the ITC's finding that U.S. stocker prices increased between 1996 to 1998. Further, plaintiffs point to a statement by the ITC indicating supplies of U.S. feeder cattle in connection with imports of feeder cattle from Mexico in 1995 "'contributed to the *decline in feeder cattle prices [in 1996].*'" (Plaintiffs' Mem. at 48 (citing Cattle and Beef: Impact of the NAFTA and Uruguay Round Agreements on U.S. Trade, USITC Pub. 3048, at 2–16 (July 1997), AR Doc. 232, *in* Appendix of Public Record Documents to Accompany Plaintiffs' Rule 56.2 Motion for Judgment Upon the Agency Record (Plaintiffs' App.).) Plaintiffs question the ITC's apparent lack of explanation for its departure from the earlier finding.

Concerning impact, plaintiffs contend the ITC failed to explain why economic analysis that provided quantitative estimates of the financial impact of Mexican imports on domestic producers did not have a significant adverse impact in the U.S. Moreover, plaintiffs argue, the ITC failed to explain in the case at bar why the industry's weak performance was attributed to the industry's "'liquidation phase of the cattle cycle'" rather than to the imports from Mexico as had occurred with the Canadian case. (Plaintiffs' Mem. at 49 (quoting *Live Cattle from Mexico* at 26).) Such analysis, plaintiffs contend, does not comport with the clear and convincing standard required of preliminary determinations.

Plaintiffs further contend that the ITC failed to consider what additional information on competition between imports would be collected in the final investigation. According to plaintiffs, the ITC relied heavily

on secondary evidence, while only relying on a small sampling of primary evidence. Moreover, the primary evidence mainly consisted of limited responses to importer questionnaires. In a final review, plaintiffs contend, the ITC likely would be able to collect information which could support a contrary outcome regarding cumulation and injury.

B. *Defendant*

Defendant, United States International Trade Commission, argues the Commission's determination not to cumulate subject imports was based on clear and convincing evidence and therefore was not arbitrary or capricious and was otherwise in accordance with law. Defendant also asserts the plaintiffs' arguments inappropriately invite the Court to conduct a *de novo* review of the evidence and to substitute the Court's judgment for that of the Commission, a review unsupported by case law. Additionally, the Commission contends that, contrary to plaintiffs' allegations, the ITC conducted a thorough analysis of the evidence, using traditional cumulation factors, to determine whether the subject imports from Canada and Mexico competed with each other and rationally determined, based on the evidence before it, that they did not.

Specifically, the ITC contends that this Court and Congress have affirmed the Commission's practice of considering four factors to assess whether subject imports compete with each other for the purposes of determining whether to cumulate imports. These factors are: (1) the degree of fungibility between the imports from different countries and between imports and the domestic like product; (2) the presence of sales or offers to sell in the same geographic markets of imports from different countries and the domestic like product; (3) the existence of common or similar channels of distribution for imports from different countries and the domestic like product; and (4) whether the imports are simultaneously present in the market. According to defendant, the ITC used these factors as prescribed by law and, based on an independent evaluation of the factors with respect to each economic situation, made its competition determination.

The Commission also argues both the Courts and Congress have endorsed the Commission's practice of finding competition between the subject imports only where there is a "reasonable overlap" in competition between the subject imports. In applying this standard to the four-factor test, the ITC argues it found no reasonable overlap in competition between cattle imported at different stages of development. Further, the Commission argues that although it may not have specifically addressed plaintiffs' arguments that the market for live cattle is national, the Commission is presumed to have considered all evidence in the record, and it is not required to comment on every piece of evidence presented by the parties.

The ITC additionally argues it followed established practice in reaching its final determination. Contrary to plaintiffs' argument, the ITC contends it is established practice to analyze the facts of each case in terms of the factors customarily used in a cumulation analysis. For ex-

ample, the Commission has not cumulated imports from multiple countries where, as here, imports from multiple countries were different products with very little overlap in competition between respective imports. In contrast, where imports from one country were the same products as those imported from another country, the ITC has cumulated the products. In accordance with established practice, defendant argues, the ITC here correctly made its cumulation determination based on the specific facts in the record.

The Commission next argues it reasonably found that the evidence relating to its traditional four-factor test clearly and convincingly supported a decision not to cumulate subject imports from Mexico and Canada. First, concerning fungibility, the ITC argues it correctly found there was not a sufficient degree of fungibility based on the facts underlying the investigations. Specifically, the Commission found there are distinct developmental stages for cattle: calf stage, stocker/yearling stage, and feeder stage. The Commission found the transformation from calf to fed cattle to be significant, given the fact the animal doubles or triples in size from a weaned calf of 400 pounds to a slaughter weight of 1,200 pounds. The Commission found subject imports from Mexico differ in their developmental stages from the imports from Canada. For example, official import statistics show that virtually all cattle from Mexico (96 percent by weight) in 1997 were cattle weighing between 90–320 kilograms, or 198–704 pounds, primarily corresponding with the calf or stocker stage of development while virtually all cattle from Canada (95.4 percent by weight) in 1997 weighed over 320 kilograms, or more than 704 pounds, primarily fed cattle ready for immediate slaughter. The Commission found, based on this evidence, that the imports from Mexico and Canada were imported at different stages of development.

The ITC argues it further found that live cattle which have not been fed to slaughter "are not substitutes for cattle ready for immediate slaughter." (Defendant United States International Trade Commission's Memorandum in Opposition to Plaintiffs' Motion for Judgment Upon the Agency Record (Def's Mem.) at 28.) Specifically, the ITC found that cattle not at the slaughter stage will not produce the same type of marketable beef in terms of quality and sized pieces. The Commission found because cattle in different stages of development are poor substitutes for each other, the imports from Canada and Mexico are poor substitutes for each other as well.

The ITC also argues it found that there were differences in the breeds, condition/health, and individual genetics among the subject imports from Mexico and Canada which may affect the quality grade of the meat the animals produce. According to the ITC, the evidence showed that cattle imported from Canada tended to be British breeds (*e.g.*, Angus, Hereford) that are likely to produce high-priced and choice quality grade meat. Subject imports from Mexico, on the other hand, were usually Brahman or Brahman cross-breeds which are less likely to produce

prime or choice grade meats. Based upon evidence showing distinctions among levels of development of the cattle, differences in the quality of meat produced at the various stages of development of the cattle, and differences in the breeds of the cattle imported from Canada and Mexico, the Commission contends it was reasonable for the ITC to find no fungibility existed among the subject imports from Canada and Mexico.

Further, defendant argues, the inquiry concerning fungibility for the purposes of cumulation differs from an inquiry into fungibility in another context. According to defendant, "[t]his Court repeatedly has held that 'like product, cumulation, and causation are functionally different inquiries because they serve different statutory purposes. As a result, each inquiry requires a different level of fungibility.'" (Def.'s Mem. at 29 (quoting *BIC Corp. v. United States*, 964 F. Supp. 391, 399 (CIT 1997) (citation omitted)).) Thus, the fact that the ITC found one like product at all stages of cattle development does not negate its finding that the subject imports from Mexico and Canada for cumulation purposes are not fungible. Moreover, defendant argues, the ITC did not find the products to be interchangeable for the like product analysis in this instance. Thus, its finding regarding interchangeability in its domestic like product determination is consistent with its finding concerning fungibility in its cumulation determination.

Second, the Commission argues it reasonably found there was only limited geographic overlap between the subject imports from Mexico and Canada as there were only five states in which the subject imports overlapped. Moreover, although the ITC acknowledges it misidentified Indiana rather than Idaho as one of the five overlapping states, the ITC argues the misidentification was harmless. Defendant argues the misidentification caused no change in the total import data only in the identification of the name of the state. Further, the import data for Idaho evidenced a lower degree of overlap between Canadian and Mexican imports than the comparison based on data from Indiana. Despite the error, defendant argues, its conclusions were supported by evidence in the record, and defendant had a rational basis for its conclusion.

Third, defendant argues its determination regarding channels of distribution was correct as the Commission found the purchasers, and thus the channels of distribution, vary depending on the stage of development of the cattle. According to defendants, the channels of distribution for cattle weighing under 650 pounds are backgrounding or stocker/yearling operations. On the other hand, defendant argues, cattle ready for slaughter are purchased by the packers or their order buyers. As virtually all subject imports from Mexico are imported at the stocker/yearling stage of development and as virtually all subject imports from Canada are imported at the slaughter stage, the subject imports from each country entered through different channels of distribution. Thus, the Commission argues, it reasonably found that imports from Canada and Mexico enter the U.S. through different channels of distribution as they are at different stages of development. As the ITC found the subject

imports from Mexico and Canada were insufficiently fungible and the channels of distribution of the subject imports were different because the imports enter at different stages of development, it was reasonable, the ITC argues, for the ITC to find there was no reasonable overlap of competition between imports from Canada and Mexico.

Next, the ITC contends the Commission's negative injury determination regarding imports of live cattle from Mexico was not arbitrary or capricious and was otherwise in accordance with law. In making its determination, defendant argues, the Commission properly considered the volume of the subject imports, their effect on prices for the domestic like product, and their impact on domestic producers of the domestic like product. Given these considerations, the ITC contends it reasonably concluded that clear and convincing evidence supported a negative injury determination.

Specifically, the ITC argues it reasonably concluded based on the small volume of subject imports from Mexico and the Mexican imports' small share of the U.S. market that the volume of imported cattle from Mexico was not significant. The ITC found the volume and market share of subject imports from Mexico were small over the period of investigation. Moreover, the Commission contends, the quantity of imports by weight and by head decreased over fifty percent since 1995, and despite some increases in imports from Mexico during the interim period, the imports remained at historically low levels. Furthermore, defendant found the number of Mexican imports held a small and decreasing share of the U.S. market, declining from 1.7 percent in 1995 to 0.5 percent in 1997 and 1998.[8] Although the ITC acknowledges imports from Mexico were at their highest in 1995, defendant argues this high volume of imports was an aberration attributable to the drought in Mexico at the time and that the Commission reasonably chose to focus on the small volume of imports over the period of the investigation. Such facts, defendant contends, reasonably constitute clear and convincing evidence that the volume of subject imports from Mexico was not significant.

Defendant additionally argues the Commission reasonably concluded that the insignificant volume of imports from Mexico has not adversely affected domestic prices to a significant degree in accordance with the requirements under 19 U.S.C. § 1677(7)(C)(ii). Defendant states it focused its determination of the price effects of imported cattle from Mexico on the historically low and declining levels of imports from Mexico. Further, the ITC contends it found the prices for stocker and feeder cattle in the U.S. market increased from 1996 to 1998. As the ITC found no direct relationship between the pricing data for stocker/feeder cattle and for fed cattle ready for immediate slaughter, the Commission argues it reasonably found the insignificant volume of Mexican imports did not adversely affect domestic prices to a significant degree.

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[8] The percent by weight for 1997 and 1998 refers to the interim periods, January to October 1997 and 1998.

The Commission also asserts plaintiffs' contention that the Commission used different time periods for analyzing price and volume in its material injury determination is inaccurate. Rather, defendant argues, it considered data over the entire period of the investigation concerning both volume and price for both Canada and Mexico. Therefore, the ITC contends, it did consider data over the entire period of the investigation for both the import volume and price sections of the determination.

The ITC additionally argues the Commission reasonably concluded based on the record that the subject imports from Mexico have not had a significant adverse impact on the domestic industry of live cattle. The Commission contends it was reasonable for it to conclude the imports from Mexico did not have a significant adverse impact on the domestic industry because it found the subject imports held only a small and declining share of the U.S. industry. Moreover, the Commission also found that the cattle industry's weak performance represented a normal cyclical downturn expected during the liquidation phase of the cattle cycle. Because of the small volume of imports and the nature of the industry's cycle during the period of investigation, the ITC argues it reasonably concluded that the cattle industry's downturn was not exacerbated by the insignificant volume of Mexican imports.

The Commission's final argument is that no likelihood exists that contrary evidence would arise in a final investigation in accordance with the requirements of 19 U.S.C. § 1673b(a) (1994)[9], as interpreted by the ITC and upheld by this Court. *See American Lamb Co. v. United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986). The Commission argues it relied on complete data for its determination. Although the ITC acknowledges it used primarily secondary sources to reach its negative injury determination, the ITC asserts such a reliance was reasonable given the extremely large and dispersed nature of the domestic live cattle industry. Further, as the ITC had complete, comprehensive, and reliable information for its secondary sources (*e.g.*, data compiled by the U.S.D.A. and official import statistics), there is no evidence these sources would change or add more information in the near future. Moreover, defendant argues, plaintiffs supported the use of secondary sources and did not challenge the methodology for obtaining the information nor the sufficiency of it during the course of the ITC's investigation. As a result, the Commission asserts, the plaintiffs cannot now complain about the Commission's methodology.

C. *Defendant-Intervenor*

Defendant-Intervenor, Confederación Nacional Ganadera (CNG), contends the plaintiffs, through their argument, have improperly asked the Court to depart from the established standard of review. CNG asserts the plaintiffs argue the Commission erred, not by not having suffi-

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[9] 19 U.S.C. § 1673b(a) (1994) states, in pertinent part, that in making its preliminary determinations, the Commission "shall determine, based on the information available to it at the time of the determination, whether there is a reasonable indication that * * * an industry in the United States * * * is materially injured, or * * * is threatened with material injury * * *."

cient evidence on the record to make its determination, but rather because it analyzed the evidence in a neutral and balanced manner. Thus, plaintiffs essentially ask for reversal because the ITC did not analyze the evidence in light more favorable to the petitioners. CNG contends, however, that the Commission acted entirely properly in weighing the evidence before it and resolving conflicts within the evidence before making its determination. Moreover, CNG argues, plaintiffs have not shown that the decision lacked a rational basis in fact. Accordingly, CNG contends, the appeal must be dismissed.

Next, CNG argues the Commission correctly decided not to cumulate subject imports from Mexico and Canada. According to CNG, the Commission's decision not to cumulate flowed from its determination that the imports from Mexico and Canada do not compete. As the determination was based on facts well-supported by the evidence on the record, the Commission's determination, CNG contends, should be affirmed.

Specifically, CNG argues, the Commission properly employed its traditional four-factor test, which has been approved by this Court and the Federal Circuit Court of Appeals, to determine whether the subject imports from Mexico and Canada compete pursuant to 19 U.S.C. §§ 1677(7)(G)(i) and 1677(7)(H) (1994). In applying its test, CNG asserts, the Commission considered all four factors. Because three of the four factors weighed against a finding of competition, CNG argues, for reasons substantially similar to those of the defendant, the Commission reasonably concluded there was no reasonable degree of overlap in competition between the imports from Canada and Mexico.

Further, CNG asserts, plaintiffs' argument that the subject imports from Mexico and Canada do compete is without merit. Specifically, CNG states the statute does not require, as plaintiffs appear to contend, that the Commission consider whether the imported products will compete with each other at some point in the future. Rather, CNG argues, the statute focuses on whether the imports compete. Such a requirement focuses the analysis on the level of competition at the stage of development in which the subject merchandise is imported. Alternatively, CNG argues, even if the statute did not require the Commission to consider competition in terms of the condition of the imports at importation, there is nothing within the statute which would forbid the ITC from considering competition at that time. Thus, CNG contends, the Commission did not commit legal error in choosing not to consider future competition between the subject imports.

CNG additionally asserts the plaintiffs' argument concerning finished and unfinished products is without merit. Specifically, CNG asserts that the comparison to which plaintiffs refer, primarily the *Pipe Fittings*[10] case, involves a transformation process which is relatively simple, adds relatively little value, and can be accomplished in a fairly short period of time. By contrast, CNG contends, the process for trans-

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[10] In its discussion, CNG appears to be referring to *Certain Carbon Steel Butt-Weld Pipe Fittings from China and Thailand*, USITC Pub. 2401, Invs. Nos. 731-TA-520 and 521 (Prelim.) (July 1991).

forming stockers into fed cattle involves a substantially longer and more complicated process. The process for transforming stockers into fed cattle nearly doubles the weight and value of the cattle.

Moreover, defendant-intervenor argues, the companies which purchase the semifinished products in this case differ from those in *Pipe Fittings*. Whereas in *Pipe Fittings* the same companies that purchased semifinished pipe fittings also produced the finished merchandise, here, CNG alleges, the companies which purchase the Mexican stockers do not generally sell the finished product in competition with slaughter-ready cattle from Canada. Rather, the Mexican stockers are sold to fed lots which in turn usually sell the cattle to slaughterhouses in competition with imports from Canada. Thus, CNG argues, it was reasonable for the Commission to conclude the cattle in this case were not analogous to the pipes in the *Pipe Fittings* case.

Defendant-Intervenor further argues the Commission's decision to treat all cattle as one domestic like product did not require it to treat all cattle as fungible in its cumulation determination. As a matter of law, defendant-intervenor argues, the Commission's like product determination cannot dictate the result of the cumulation analysis as the like product analysis is based upon a different statute and purpose than the cumulation analysis. Moreover, CNG argues the Commission's decision was entirely consistent in that it found stockers were not interchangeable with fed cattle in its like product analysis as well as its cumulation analysis.

CNG additionally argues the confusion between Idaho and Indiana in the Commission's staff report was at worst harmless error. In support of its argument, CNG states virtually all Mexican cattle imported in the United States were destined for four states (*i.e.*, Texas, New Mexico, California, and Arizona) whereas less than one percent of the cattle imported from Canada were shipped to Texas, New Mexico, California, and Arizona. Such evidence supports, CNG argues, the Commission's finding there was only a limited degree of geographic overlap.

CNG further argues the fact that subject imports from Mexico and Canada were simultaneously present in the U.S. market does not, by itself, require cumulation. As the Commission must consider all four factors in determining whether subject imports compete with each other, CNG argues it would not be reasonable for the Commission to depart from established practice and give undue weight to only one factor. Consequently, the Commission's decision that the subject imports did not compete with each other was reasonable.

CNG's final argument is that the Commission correctly determined that there is no reasonable indication that the domestic industry is injured or threatened with material injury by reason of the imports from Mexico. First, CNG argues, the Commission properly concluded that the volume of imports from Mexico was small, declining, and below historical levels as there was evidence on the record to support these findings. Instead of examining a small window of time, as the plaintiffs argue,

CNG contends the Commission properly considered overall trends of imports from Mexico. Such an analysis, CNG asserts, was appropriate given the low level of imports in 1996 following an extremely high level of imports in 1995 due to a drought in Mexico. Consequently, CNG argues, the small increase in imports from Mexico in 1997 was a move towards more normal levels rather than an indication of injury to the U.S. industry.

Second, CNG argues the Commission properly concluded that imports from Mexico were too small to have an effect on price. In contrast to plaintiffs' argument that the Commission failed to consider the price-sensitive nature of the cattle industry, CNG contends the Commission specifically considered whether the commodity nature of the industry might magnify the price effects of the Mexican imports. Based on evidence on the record, CNG asserts, the Mexican imports were too small to have a meaningful effect on prices, even given a commodity market in which relatively small volumes have significant effects on price.

Further, CNG argues plaintiffs' contention that the Commission's decision incorrectly relied on the absence of evidence of underselling by imports from Mexico misses the point. According to CNG, when analyzing the price effects of imports from Mexico, the Commission found no other evidence suggested the imports from Mexico had affected U.S. prices. Such a finding, CNG contends, was important here because there was no evidence at all that the imports from Mexico affected U.S. prices.

CNG also contends plaintiffs' allegation that the Commission improperly considered limited years for price trends is without merit. The Commission only focused on the U.S. prices during 1996–1998 because these were the only years within the period of investigation in which the imports from Mexico increased. This period, then, is the only relevant period to examine when analyzing whether imports from Mexico were depressing the U.S. market prices. As there was evidence to support the Commission's finding that the U.S. prices did not decrease while the imports from Mexico increased, CNG argues, there was a rational basis for the Commission's finding that imports from Mexico did not affect U.S. market prices.

Third, CNG contends the ITC correctly concluded that imports from Mexico did not have an adverse impact on the U.S. industry as the ITC's decision was based on evidence that there was a low volume and decreasing share of subject imports from Mexico. Moreover, CNG argues plaintiffs' assertion that the Commission's analysis of the impact of imports from Mexico was flawed because it did not accept plaintiffs' models which calculated that imports from Mexico had caused a 3.7 percent decline in U.S. feeder price, is without merit. According to CNG, the Commission did not have to accept plaintiffs' models; moreover, the evidence showed the prices for the type of cattle imported from Mexico had increased. Thus, according to CNG, the plaintiffs' model was inconsistent with evidence on the record, and plaintiffs' suggestion that the ITC should accept the theoretical modeling is wrong.

Finally, CNG argues there was no reason to believe the Commission would have discovered contrary evidence in the final investigation, and plaintiffs fail, in their brief, to identify contrary evidence that would likely arise. Thus, according to CNG, whatever additional information which might have been found would not have disturbed the Commission's determination.

STANDARD OF REVIEW

This Court shall hold unlawful any preliminary determination, finding, or conclusion made by the Commission which it finds to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See* 19 U.S.C. § 1516a(b)(1)(A) (1994). For this purpose, the Court must determine whether there is a "'rational basis in fact'" for the ITC's determination. *See Torrington Co. v. United States*, 16 CIT 220, 221, 790 F. Supp. 1161, 1165 (1992) (quoting *American Lamb*, 785 F.2d at 1004 (quoting S. REP. NO. 249, *reprinted in* 1979 U.S.C.C.A.N. 381, 638)). The ITC, when making its determination, must decide whether there is a reasonable indication for finding "(1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation." *American Lamb*, 785 F.2d at 1001.

In determining whether the ITC's approach is in accordance with law, this Court applies the two-step analysis articulated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984). *Chevron* requires the reviewing court to give effect to the intent of Congress if Congress has directly spoken to the precise question at issue and Congress's intent is clear. *See id.* If, however, Congress has not spoken directly to the issue at bar, the question for the court is whether the agency's interpretation of that issue "is based on a permissible construction of the statute." *Id.* at 843. In reviewing the ITC's interpretation, this Court "'may reject * * * that [which] contravenes clearly discernible legislative intent,' but '[the Court's] role when that intent is not contravened is to determine whether the agency's interpretation is "sufficiently reasonable."'" *Grupo Indus. Camesa v. United States*, 853 F. Supp. 440, 442 (CIT 1994) (quoting *American Lamb*, 785 F.2d at 1001 (citations omitted)).

The Court need not conclude the Commission's construction is the only interpretation the agency could have adopted, or even the interpretation the Court would have reached if the question initially had arisen in a judicial proceeding before it. *See Chevron*, 467 U.S. at 843 n.11. Rather, the focus of the inquiry is whether the Commission's interpretation of the statute is sufficiently reasonable to be accepted by the Court. *See FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981).

DISCUSSION

A. *Clear and Convincing Standard*

Plaintiffs assert that the Commission's preliminary determination was arbitrary, capricious, an abuse of discretion, and not in accordance with law because it was not supported by clear and convincing evidence in the record. Plaintiffs contend, in part, that the Commission erred by making its determination based on contradictory data in the record and acted arbitrarily in ignoring evidence clearly supporting an affirmative determination.

It has long been established that in applying the statutory standard for making a preliminary determination regarding material injury or threat of material injury, the Commission may weigh all evidence before it and resolve conflicts in the evidence. *See, e.g., American Lamb*, 785 F.2d at 1002–04. In asserting that the evidence supporting the Commission's determination is not clear and convincing because of the conflicting evidence, plaintiffs, in essence, request the Court to reweigh the evidence. The Court cannot substitute its judgment, however, for that of the Commission. Rather, its role in reviewing a decision by the ITC is to ascertain whether there was a rational basis for the determination. *See, e.g., Torrington*, 790 F. Supp. at 1167 (citing *American Lamb*, 785 F.2d at 1004). The Court may only reverse the ITC's determination if there is a "clear error" of judgment and where there is "no rational nexus between the facts found and the choices made." *See Connecticut Steel Corp. v. United States*, 852 F. Supp. 1061, 1064 (CIT 1994) (quotations and citations omitted).

B. *Cumulation*

In making its preliminary injury determination, the ITC "shall cumulatively assess" the volume and effect of imports of the subject merchandise from all countries for which petitions are filed and/or investigations are self-initiated by the administering authority on the same day if such imports "compete with each other and with domestic like products in the United States market." 19 U.S.C. § 1677(7)(G)(i).[11] In order to satisfy this provision, the ITC must, in part, determine that "a 'reasonable overlap' in competition" exists between the imports from the different countries. *Wieland Werke, AG v. United States*, 13 CIT 561, 563, 718 F. Supp. 50, 52 (1989) (quoting *Granges Metallverken AB v. United States*, 13 CIT 471, 475, 716 F. Supp. 17, 22 (1989)).

In evaluating whether imports from different countries compete with each other,[12] the ITC relies on the following four-factor test: (1) the degree of fungibility between the imports from different countries; (2) the presence of sales or offers to sell imports from different countries in the

[11] 19 U.S.C. § 1677(7)(G)(i) specifically states, in relevant part, "the Commission shall cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which * * * petitions were filed * * * on the same day * * * if such imports compete with each other and with domestic like products in the United States market."

[12] Since there is no dispute that Canadian and Mexican cattle competed with the domestic like product, this issue in this opinion is limited to review of the ITC's determination that Mexican cattle do not compete with cattle imported from Canada.

same geographic markets; (3) the existence of common or similar channels of distribution for imports from different countries; and (4) whether the imports are simultaneously present in the market. *See, e.g., Id.* at 52; *Fundicao Tupy S.A. v. United States*, 12 CIT 6, 10–11, 678 F. Supp. 898, 902 (1988). "While no single factor is determinative, and the list of factors is not exclusive, these factors are intended to provide the Commission with a framework for determining whether the imports compete * * *." *Goss Graphics Sys., Inc. v. United States*, 33 F. Supp. 2d 1082, 1086 (CIT 1998) (citations and quotation omitted).

1. *Competition*

One of plaintiffs' core arguments appears to be that the ITC's requirement that subject imports be directly interchangeable *at importation* in order to cumulate the subject imports is contrary to statute and Congressional intent. The plaintiffs' contention, however, is without merit. The plaintiffs' concern essentially involves a question of statutory interpretation. In resolving questions of statutory interpretation, *Chevron* requires this Court first to determine whether the statute is clear on its face. If the language of the statute is clear, then this Court must defer to Congressional intent. *See Chevron*, 467 U.S. at 842–43. If the statute is unclear, however, then the question for the Court is whether the agency's answer is based on a permissible construction of the statute. *See id.* at 843; *see also Corning Glass Works v. United States Int'l Trade Comm'n*, 799 F.2d 1559, 1565 (Fed. Cir. 1986) (finding the Commission's definitions must be "*reasonable* in light of the language, policies and legislative history of the statute.").

Here, the statutory provision regarding cumulation is unclear. The statute provides, in relevant part, that the Commission shall "cumulatively assess the volume and effect" of the imports of the subject merchandise from all countries if "such imports compete with each other and with domestic like products" in the U.S. market. 19 U.S.C. § 1677(7)(G)(i). To include imports in the cumulation equation, the statute requires, among other things, that they "compete with" each other and domestic like products, but it fails to define that phrase. *See Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1101 (Fed. Cir. 1990). Accordingly, the provision cannot be said to have a plain meaning. *See id.*

What Congress intended by the phrase "competes with" is not immediately clear from the legislative history of this provision, first added to the law in the Trade and Tariff Act of 1984, Pub. L. No. 98–573, § 612, 98 Stat. 2948, 3033. *See id.* The Court must, therefore, consider the purpose for enacting the cumulation provision to discern its intended meaning. *See id.*

Cumulation was mandated "to eliminate inconsistencies in Commission practice and to ensure that the injury test adequately addressed *simultaneous* unfair imports from different countries." House Comm. on Ways and Means, Trade Remedies Reform Act of 1984, H.R. REP. NO. 98–725, at 37 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5127, 5164 (empha-

sis added). The legislative history's only explicit guidance is that cumulation is designed to take into account "simultaneous unfair imports." *Id.* Because neither the statutory language nor the legislative history conclusively establishes the intended time frame in which the imports are to be considered for competition, the Court assesses the agency's interpretation of the provision to determine whether the agency's interpretation is reasonable and in accordance with the legislative purpose.

In making its competition determination, the Commission found there was insufficient evidence on the record to support a finding of competition between the subject imports from Mexico and Canada in part because when the subject imports were brought into the United States, they were imported at different stages of development. *See Live Cattle from Mexico* at 12. The Commission, therefore, appears to have considered whether the subject imports "competed with" one another at the moment of importation.

Although the statute does not specifically direct the ITC to consider whether the products at issue compete *at importation*, the statute does require that the Commission determine whether the "*imports* compete." As products are U.S. imports when they are "brought in[to] [the United States] from an outside source," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1135 (Phillip Babcock Gove, ed., Merriam-Webster, Inc., 1986) (1961), consideration by the ITC of whether subject imports compete *at importation* appears to be a reasonable interpretation of the statute. Certainly nothing within the statute *precludes* the ITC from considering competition in terms of the condition of the products at importation. Accordingly, this Court defers to the agency's interpretation of the statute. *See Zenith Radio Corp. v. United States*, 437 U.S. 443, 450–51 (1978) (agency's interpretation of the statute under which it operates is entitled to some deference).

2. *Application of four-factor competition test*

a. *Fungibility*

i. *Fungibility as a factor of competition*

Plaintiffs argue the ITC misconstrued the cumulation provision and equated "fungibility" with "competition." Plaintiffs' argument appears, in part, to challenge the ITC's use of "fungibility" as a factor in assessing whether the subject imports compete with each other. This Court, however, has consistently affirmed the Commission's practice of considering four factors—one of which is the degree of fungibility—to assess whether subject imports compete with each other. *See, e.g., Goss Graphics*, 33 F. Supp. 2d at 1086; *Weiland Werke*, 718 F. Supp. at 52; *United States Steel Group v. United States*, 18 CIT 1190, 1199–1200, 873 F. Supp. 673, 685 (1994); *United Eng'g & Forging v. United States*, 15 CIT 561, 582, 779 F. Supp. 1375, 1393 (1991); *Fundicao Tupy*, 678 F. Supp. at 902. Thus, to the extent plaintiffs challenge the ITC's use of fungibility in its determination of whether the subject imports compete

with each other, this Court holds the ITC's use of fungibility as a factor in determining whether the subject imports competed with each other is reasonable and should not be disturbed.

ii. *Like products and competition*

As previously noted, the Commission found the subject imports from Mexico and Canada were like products but found the products did not compete, in part, because they were not sufficiently fungible.[13] R-CALF now uses these findings in an attempt to impugn the Commission's non-cumulation determination. Plaintiffs first allege the ITC's use of a different and more rigorous standard of interchangeability[14] for its cumulation analysis than for its like product analysis is arbitrary and warrants reversal of the ITC's determination. Plaintiffs also argue it was arbitrary for the Commission to give different weight to the finding of a lack of interchangeability in the like product and cumulation analyses.

Plaintiffs' first argument fails because it overlooks the importance of context. The analysis of interchangeability for the purposes of cumulation may vary from that for like product. *See R-M Indus., Inc. v. United States*, 18 CIT 219, 226 n.9, 848 F. Supp. 204, 210 n.9 (1994) (finding analysis of substitutability may vary for purposes of like product analysis as compared with analysis of cumulation and material injury), *cited in Acciai Speciali Terni, S.P.A. v. United States*, 19 CIT 1051, 1068 (1995). Such a situation would not necessarily render inconsistent findings regarding interchangeability for the purposes of cumulation and like product analyses arbitrary, capricious, or not in accordance with law.[15]

To the extent plaintiffs' second argument implies the ITC must always find like products compete with each other for the purposes of cumulation, the plaintiffs' argument also must fail. A finding by the ITC of a like product does not control whether the ITC finds competition between the subject imports for the purpose of cumulation. *See generally BIC Corp.*, 964 F. Supp. at 398 (stating like product and cumulation are functionally different inquiries because they serve different statutory purposes). Rather, the ITC must conduct like product and cumulation analyses separately using the factors relevant to each determination. As further elaborated below, the Court finds the ITC's cumulation deter-

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[13] The Commission's finding that the subject imports were not fungible was based, in part, on the Commission's finding that the subject imports, imported at different stages of development, were not substitutes. *See Live Cattle from Mexico* at 12.

[14] Generally, the term "interchangeability" is used by the ITC in its "like product" analysis, *see, e.g., Torrington Co. v. United States*, 14 CIT 648, 652, 747 F. Supp. 744, 749 (1990), whereas the term "substitutability" is used by the ITC in its cumulation analysis. For the purposes of clarity, this opinion will use the term "interchangeability" when comparing the two standards.

[15] The ITC's determination in this case, however, is entirely consistent. Not only did the ITC find there was limited fungibility for the purposes of the cumulation determination, but it also found the subject imports were not functionally or economically interchangeable for the purpose of the like product determination. Specifically, under the cumulation analysis, the ITC found, in part, there was limited fungibility between the subject imports from Canada and Mexico because the products were imported at different stages of development and therefore were poor substitutes for each other. *See Live Cattle from Mexico* at 13. Similarly, in the like product analysis, the ITC found the subject imports were "not functionally or economically interchangeable because in each stage other than the final stage they [had] not reached their slaughter weight." *Id.* at 6.

mination is neither arbitrary nor capricious and is otherwise in accordance with law.[16]

b. *Geographic overlap*

Plaintiffs contend the Commission misidentified the states in which the subject imports overlapped. Specifically, plaintiffs state the ITC "committed error in finding that imports of Mexican and Canadian cattle overlapped in Indiana rather than Idaho." (Plaintiffs' Reply at 4.) Although plaintiffs acknowledge that the ITC admits it committed this error, plaintiffs assert the error was not harmless as such evidence shows "Mexican cattle were present near the U.S.-Canadian border with Canadian cattle, just as Canadian cattle were present near the U.S.-Mexican border with Mexican cattle." (Plaintiffs' Reply at 4.)

The Court does not agree with plaintiffs' assertion that the Commission's error is not harmless. In reaching its decision, the Court must be careful not to remand the ITC's preliminary determination for an error of fact unless the Court is in substantial doubt regarding whether the ITC would have reached the same conclusion were the error not to have occurred. *See, e.g., Campbell v. Merit Sys. Protection Bd.*, 27 F.3d 1560, 1570 (Fed. Cir. 1994) (citing *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 139 (1st Cir. 1953)). Although the ITC erroneously identified one of the states in which the subject imports overlapped, there is other information on the record which supports the ITC's conclusion that there was little geographic overlap between subject imports of live cattle from Canada and Mexico.

Specifically, according to evidence before the ITC, the majority of the imports from Mexico went to four states (California, New Mexico, Texas, and Arizona: 96.3 percent) whereas only 0.51 percent of the imports from Canada went to those same states. (*See* Post-Conf. Brief of CNG at 8–9, AR Doc. No. 181, *in* Appendix of Administrative Record Documents to Accompany Defendant-Intervenor's Brief Opposing Plaintiffs' Rule 56.2 Motion for Judgment Upon the Agency Record (Def.-Interv.'s App.).) In the states in which there was overlap, the imports from one country or sometimes both countries were minimal. *See* Table D–1, *Live Cattle from Mexico* at D–3.[17] Further, as pointed out by the Commission, when corrected for the error, there appears there would have been less of

[16] Plaintiffs additionally assert in their principal brief that the ITC's finding with respect to competition between Canadian and Mexican imports was erroneous because it rested, in part, on the ITC's conclusion that "'there appears to be no direct relationship between the prices for stocker/feeder cattle * * * and fed cattle ready for slaughter.'" (Plaintiffs' Mem. at 34 (quoting *Live Cattle from Mexico* at 24–25).) While price may be a relevant consideration in making a cumulation determination to the extent it is used to identify the market segment in a fungibility analysis, *see Granges Metallverken AB v. United States*, 716 F. Supp. 17, 22–24 (CIT 1989), price is most relevant to the ITC's material injury determination. Moreover, the conclusion which plaintiffs challenge exists in the ITC's material injury analysis. Thus, this Court analyzes plaintiffs' challenge to the ITC's conclusion regarding the relationship between prices for stocker/feeder cattle and fed cattle under the material injury section.

[17] According to Table D–1, the following number of Mexican and Canadian cattle were imported into the overlapping states during the period of investigation: (1) Colorado: 459,872 from Canada (9.3 percent share); 38,657 from Mexico (1.3 percent share); (2) Idaho [for the purpose of this comparison, the Court substitutes "Idaho" for "Indiana" to correct the error committed by the ITC in constructing this table; it is the Court's understanding that the ITC inaccurately identified "Indiana" on the table listing Mexican imports instead of the correct state, "Idaho"]: 230,960 from Canada (4.7 percent share); 32,344 from Mexico (1.1 percent share); (3) Kansas: 95,937 from Canada (1.9 percent share); 28,118 from Mexico (0.9 percent share); (4) Nebraska: 558,805 from Canada (11.3 percent share); 5,690 from Mexico (0.2 percent share); and (5) Texas: 13,809 from Canada (0.3 percent share); 1,398,874 from Mexico (46.5 percent share). *See Live Cattle From Mexico* at D–3.

an overlap between Canadian and Mexican cattle than existed when Indiana was incorrectly listed as an overlapping state.[18] (See Def.'s Mem. at 31–32 n.89.) Therefore, though the ITC acknowledges making a factual error, this Court finds there is not substantial doubt as to whether the ITC would have reached the same conclusion were it to have correctly identified the overlapping states. Accordingly, this Court finds that the ITC had a rational basis for concluding there was limited geographic overlap between the markets for the subject imports from Canada and Mexico.

c. *Channels of distribution*

Plaintiffs allege the ITC erred in concluding that "the purchasers, and thus the channels of distribution, vary depending on the stage of [development of the cattle]." *Live Cattle from Mexico* at 14. Specifically, plaintiffs state that there was evidence on the record that "*feedlots* may acquire *stocker* cattle as well as *feeder cattle* and that *packers* (i.e., the slaughterhouses) may acquire *feeder cattle* as well as *fed cattle* ready for slaughter." (Plaintiffs' Reply at 3.)

Plaintiffs' challenge merits some consideration. Evidence identified by plaintiffs does suggest some packers purchased live cattle at both the fed and feeder stages of development. Nevertheless, there is evidence on the record that the ITC was aware that a limited number of operators in one segment of the market purchased cattle at another stage of development. *See Live Cattle from Mexico* at 6–7 n.26. "'Absent some showing to the contrary, [the ITC] is presumed to have considered all evidence in the record'" in making its determination. *See, e.g., Connecticut Steel*, 852 F. Supp. at 1065 (quoting *Rhone Poulenc, S.A. v. United States*, 8 CIT 47, 55, 592 F. Supp. 1318, 1326 (1984) (citation omitted)). Further, the Court need only find that the ITC's path was reasonable. Evidence on the record supports the ITC's conclusion. For example, plaintiffs admit that the "majority [of Canadian cattle] enter for slaughter, after being purchased by the packers or their order buyers" whereas the volume of Mexican cattle "purchased for immediate slaughter is minimal." (R-CALF Post-Conf. Brief, Responses to Questions at 22–23, AR Doc. 180, *in* Defendant U.S. International Trade Commission's Memorandum in Opposition to Plaintiffs' Motion for Judgment Upon the Agency Record Appendix.) This Court finds the ITC's determination was reasonable and therefore not arbitrary and capricious or an abuse of discretion.[19]

3. *Cumulation of finished and unfinished products*

Another of plaintiffs' core arguments is that the ITC's determination not to cumulate the subject imports which entered the United States at different stages of development is inconsistent with long-standing

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[18] For example, a total of 230,960 cattle imported from Canada entered Idaho during the period of investigation while only 32,344 cattle imported from Mexico entered Idaho. In contrast, a total of 48,431 cattle imported from Canada entered Indiana compared with the erroneously reported 32,344 cattle imported from Mexico. *See id.*

[19] The Commission found, and the plaintiffs do not protest, that the imports of live cattle from Canada and Mexico were simultaneously present in the market throughout the period of the investigation. Therefore, this issue will not be addressed in this opinion.

agency practice to cumulate finished and unfinished products where both finished products were intended for the same end use. Plaintiffs cite in their brief and in answers submitted in response to the Court's inquiry to several ITC determinations which plaintiffs claim support their assertion.[20] In particular, plaintiffs point to the preliminary investigations of imported pipe fittings from China and Thailand where the ITC cumulated the finished and unfinished pipe fittings even though they were "'*finished by domestic producers* * * * *and sold as domestic product.*'" (Plaintiffs' Mem. at 18 (quoting *Certain Carbon Steel Butt-Weld Pipe Fittings from China and Thailand*, USITC Pub. 2401, at 17–18, Invs. Nos. 731–TA–520 and 521 (Prelim.) (July 1991)).) Plaintiffs argue that since the ITC has a consistent practice of cumulating finished and unfinished imports, the ITC must follow this practice or state it is aware that it is changing its views and articulate permissible reasons for that change. (Plaintiffs' Reply at 11–12 (citing *Citrosuco Paulista, S.A. v. United States*, 12 CIT 1196, 1209, 704 F. Supp. 1075, 1088 (1988); *Atchison, Topeka & Santa Fe R.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808–09 (1973)).)

The Court does not agree with plaintiffs' assertion that the ITC has a "practice" of cumulating finished and unfinished products. An action by the ITC becomes an "agency practice" when a uniform and established procedure exists that would lead a party, in the absence of notification of change, reasonably to expect adherence to the established practice or procedure. *See, e.g., Heraeus-Amersil, Inc. v. United States*, 9 CIT 412, 416, 617 F. Supp. 89, 93 (1985). Upon examination of substantially all the determinations cited by the parties where the ITC has addressed the issue of cumulation of finished and unfinished products, there does not appear to be a "practice" by the ITC of cumulating subject imports where, as here, the products are imported at various stages of development.

Although many of the cases cited by the parties do cumulate finished and unfinished products, the cumulation analysis does not focus on the finished and unfinished nature of the products. Rather, the analysis focuses on the four-factor test used by the ITC in determining whether the imports compete with each other (fungibility, geographic overlap, simultaneous presence in the market, and channels of distribution). Based on these four factors, the ITC appears to make independent, case-by-case decisions regarding whether the imported products must be cumulated. Such a conclusion is consistent with past Court determinations which have required the ITC decisions to be "based upon an independent evaluation of the factors with respect to the unique economic situation of

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[20] Plaintiffs cite, in their original brief, to the following ITC determinations: *Certain Carbon Steel Butt-Weld Pipe Fittings from China and Thailand*, USITC Pub. 2401, Invs. Nos. 731–TA–520 and 521 (Prelim.) (July 1991); *Certain Carbon Steel Butt-Weld Pipe Fittings From France, India, Israel, Malaysia, The Republic of Korea, Thailand, The United Kingdom, and Venezuela*, USITC Pub. 2767, Invs. Nos. 701–TA–360 and 361 (Prelim.);731–TA–688 through 695 (Prelim.) (April 1994); *Certain Granite from Italy and Spain*, USITC Pub. 2016, Invs. Nos. 701–TA–288 and 289 (Prelim.); 731–TA–381 and 382 (Prelim.) (Sept. 1987); *Certain Cased Pencils From The People's Republic of China and Thailand*, USITC Pub. 2713, Invs. Nos. 731–TA–669–670 (Prelim.) (Dec. 1993). Plaintiffs cite to an additional seventeen ITC determinations in their answers submitted in response to the Court's inquiry. (*See* Plaintiffs' Answers to Questions by the Court at 3.)

each product and industry under investigation." *Citrosuco Paulista*, 704 F. Supp. at 1087–88; *see also Alberta Pork Producers' Mktg. Bd. v. United States*, 11 CIT 563, 583, 669 F. Supp. 445, 461 (1987); *see generally Maine Potato Council v. United States*, 9 CIT 293, 300 n.7, 613 F. Supp. 1237, 1244 n.7 (1985).

Moreover, the subject imports at issue here are distinguishable from subject imports where the ITC has cumulated finished and unfinished products. In the majority of cases cited by plaintiffs, the finishing process for the unfinished products is relatively minor. For example, in the pipe fitting cases, the finishing process is minimal, involving finishing steps such as shot-blasting, heat treatment, machining, etc. *See, e.g., Butt-Weld Pipe Fittings from Brazil and Taiwan*, USITC Pub. 1918, at 7 n.17, Invs. Nos. 731–TA–308 and 310 (Final) (Dec. 1986). The weighted average cost attributable to the finishing process is only about fourteen percent of the total cost of production. *See id.* at 6–7. Further, finishing does not significantly alter the function of the fitting. *See id.* at 6.

In contrast, the alleged "unfinished" merchandise at issue here undergoes a "substantial transformation" in the United States. According to Robin L. Turner, attorney for the United States International Trade Commission, of the cattle imported from Mexico, approximately "two-thirds [of the size and weight of the cattle] gets added * * * in the United States." (Oral Argument Transcript, July 28, 1999, at 60 (Arg. Tr.).) Moreover, Mexican cattle "take a year to become beef." (Arg. Tr. at 57.) The Court finds the degree of transformation and the length of time needed to transform the alleged "unfinished" imports from Mexico into "finished" products distinguishes these products from other products in cases in which the ITC has cumulated finished and unfinished imports. In adhering to the above finding, this Court does not endorse plaintiffs' contention that the ITC is bound in this case to its past actions of cumulating finished and unfinished products where, as here, cumulation is not supported by the facts in the record.

For the foregoing reasons, the Court finds the ITC's determination not to cumulate the subject imports from Mexico with those from Canada is not arbitrary or capricious, not an abuse of discretion, and is otherwise in accordance with law.

C. *The ITC's Negative Injury Determination*

In determining whether there is a reasonable indication of material injury or threat of material injury by reason of the subject imports under investigation pursuant to 19 U.S.C. § 1673b(a), the ITC closely follows the statutory outline and focuses its attention on the volume of imports of the subject merchandise, the effects of those imports on prices in the United States for domestic like products, and the impact of those imports on domestic producers of domestic like products. *See* 19 U.S.C.

§ 1677(7)(B) (1994). In evaluating each of these issues, the ITC specifically considers the factors set forth in 19 U.S.C. § 1677(7)(C).[21]

The Court notes that Congress has vested the ITC with considerable discretion as to the weight it will assign a given factor in making its injury determination.[22] *See, e.g., Copperweld Corp. v. United States*, 12 CIT 148, 156, 682 F. Supp. 552, 564 (1988). In reviewing the ITC's determination, it is not this Court's function to decide that, were it the ITC, it would have made the same decision on the basis of the evidence. *See, e.g., Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 936 (Fed. Cir. 1984). This Court will not disturb the ITC determination so long as a rational basis exists for the choices made by the ITC. *See, e.g., Bowman Transp., Inc. v. United States*, 419 U.S. 281, 285 (1974).

1. *Volume of imports*

Plaintiffs argue there are undisputed facts in the record which demonstrate that the ITC's negative preliminary injury determination failed to satisfy the "clear and convincing" standard of evidence required of the ITC, and therefore its negative injury determination is contrary to law. Specifically, plaintiffs argue the ITC failed to address the price sensitivity of the market and the impact even a "modest volume" of imported cattle can have on prices in the domestic market. Plaintiffs state this omission is in conflict with the Commission's statement concerning the effects of Canadian cattle imports on the domestic market that even "'relatively small volumes [of imports] can have significant price effects in this price-sensitive market,'" (Plaintiffs' Mem. at 45 (quoting *Live Cattle From Mexico* at 20)), and the ITC's own view

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[21] 19 U.S.C. § 1677(7)(C) (1994) specifically states:

(C) Evaluation of relevant factors

For purposes of subparagraph (B)—

(i) Volume

In evaluating the volume of imports of merchandise, the Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.

(ii) Price

In evaluating the effect of imports of such merchandise on prices, the Commission shall consider whether—

(I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and

(II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

(iii) Impact on affected domestic industry

In examining the impact required to be considered under subparagraph (B)(i)(III), the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry in the United States, including, but not limited to—

(I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,

(II) factors affecting domestic prices,

(III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment,

(IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and

(V) in a proceeding under part II of this subtitle, the magnitude of the margin of dumping.

The Commission shall evaluate all relevant economic factors described in this clause within the context of the business cycle and conditions of competition that are distinctive to the affected industry.

[22] Congress has explained that:

The significance of the various factors affecting an industry will depend upon the facts of each particular case. Neither the presence nor the absence of any factor listed in the bill can necessarily give decisive guidance with respect to whether an industry is materially injured, and the significance to be assigned to a particular factor is for the ITC to decide.

S. REP NO. 96-249, at 86 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 474.

from its 1997 section 332 study which found a significant correlation between changes in prices and import supplies of cattle. (Plaintiffs' Mem. at 45 (citing Cattle and Beef: Impact of the NAFTA and Uruguay Round Agreements on U.S. Trade, USITC Pub. 3048, at K–9 through K–11 (July 1997), AR Doc. 232, *in* Plaintiffs' App.).) Moreover, plaintiffs argue the ITC failed to focus on certain data which showed an increase in imports of Mexican cattle by 47.7 percent by head and 51.1 percent by weight between 1996 and 1997.

Plaintiffs' challenges lack merit. First, regarding plaintiffs' contention that the ITC failed to consider the significance the volume of Mexican cattle allegedly had on the price-sensitive domestic cattle industry, there is evidence on the record that the ITC specifically considered the volume of Mexican cattle in the context of the domestic industry. In its analysis concerning volume, the ITC concluded that "the small volume of subject imports from Mexico and their market share, *even in the context of the conditions of competition for this industry*, are not significant." *Live Cattle from Mexico* at 24 (emphasis added). Further, as discussed below, there was a rational basis for the ITC to have found that the small volume of Mexican imports did not significantly affect the domestic price. Therefore, it was reasonable for the ITC to conclude that the small volume of cattle from Mexico was not significant.

Second, regarding plaintiffs' allegation that the ITC failed to focus on data showing an increase in the imports of Mexican cattle in 1996–97, the plaintiffs' claim is equally without merit. Although there was an increase in the market share of imports from Mexico between 1996–1997, the ITC acknowledges this increase in its report. *See Live Cattle from Mexico* at IV–2. As stated previously, "'[a]bsent some showing to the contrary, [the ITC] is presumed to have considered all evidence in the record'" in making its determination. *See, e.g., Connecticut Steel*, 852 F. Supp. at 1065 (quoting *Rhone Poulenc*, 592 F. Supp. at 1326). Further, in conducting its review, the Court need only consider whether there has been a clear error of judgment on the part of the ITC. The Court will not disturb the ITC's determination so long as a rational basis exists for the choices made by the ITC. *See Bowman*, 419 U.S. at 285. Here, the ITC examined the overall trend of imports from Mexico and found, in part based on the historical data, that imports from Mexico held a small and decreasing share of the U.S. market over the period of investigation, *see Live Cattle from Mexico* at 23–24, Table C–1, and Table IV–3[23], and were at an historical low. (*See* Post-Conf. Brief of CNG at 12–14 and Appendix 4, AR Doc. No. 181, *in* Def.-Interv.'s App.) Thus, this Court finds the ITC had a rational basis for its conclusion concerning the volume of imports from Mexico.

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[23] Table C–1 shows that U.S. imports of live cattle from Mexico by weight were 709.3 million pounds in 1995, 196.8 million pounds in 1996, and 297.2 million pounds in 1997. Table IV–3 shows the share of quantity of cattle from Mexico decreased by weight from 1.7 percent in 1995 to 0.5 percent in 1996 to 0.7 percent in 1997 to 0.5 percent from January to October in 1997 and 1998.

2. *Price effects*

Plaintiffs argue the ITC's analysis regarding the effect of imports of Mexican cattle on domestic prices is also deficient. First, plaintiffs contend the ITC's analysis is deficient because the ITC incorrectly relied on the absence of evidence of underselling by imports from Mexico whereas it discounted the evidence regarding the presence of underselling by imports from Canada. Second, plaintiffs argue the ITC's pricing analysis was flawed because the ITC concluded that "there appears to be no direct relationship between the prices for stocker/feeder cattle * * * and fed cattle ready for slaughter," *Live Cattle from Mexico* at 24–25, despite evidence that there is a correlation between the prices of cattle at different stages of development.

In support of their latter argument, plaintiffs contend there is evidence that lower fed cattle prices depress the returns possible on the stocker cattle which have grown to slaughter-ready cattle. Also, plaintiffs cite to a report which states, "imports of live cattle from Mexico (which are mostly lightweight feeder cattle) reduced feeder prices by $1.05 per [cwt][24]" and that "eliminating 33 percent of the live cattle imports from Mexico will increase prices of fed cattle by $0.48 per [cwt] and feeder cattle by $0.79 per [cwt]." (R-CALF Post-Conf. Brief, Ex. 10, at 3, 5, AR Doc. 180, *in* Plaintiffs' App.) Further, plaintiffs point to evidence which states, "[t]he impact of unfairly traded live cattle imports from Mexico are not as immediate * * * [t]he direct price impacts are felt by cow-calf producers, whose product competes directly with Mexican live cattle. Fed cattle producers are impacted after those feeders are finished in feedlots and sent to packing houses, resulting in increased supplies of live cattle for slaughter and lower returns for U.S. fed cattle." (Transcript Dated 12/2/98 Filed by Office of Investigations, on behalf of the Commission at 41–42, AR Doc. 154, *in* Supplemental Appendix of Public Record Documents to Accompany Plaintiffs' Reply to Opposition of Defendant and Defendant-Intervenor to Plaintiffs' Motion for Judgment on the Agency Record.)

Plaintiffs additionally argue the ITC used a different time period to analyze the overall change in import volumes and the price trends concerning the imports from Mexico and that the use of different time periods in the ITC's determination is arbitrary and capricious. Plaintiffs also identify evidence that recent data showed U.S. prices for stockers declining in certain quarters between 1996 to 1998 which conflicts with the ITC's finding that U.S. stocker prices "'increased from 1996 to 1998.'" (Plaintiffs' Mem. at 47 (quoting *Live Cattle from Mexico* at 24 n.145).) Further, plaintiffs question why the ITC did not explain why an earlier finding that "'[l]arge supplies of U.S. feeder cattle coupled with increased imports of feeder cattle from Mexico during 1995 contributed to the decline in feeder cattle prices [in 1996],'" (Plaintiffs' Mem. at 48 (emphasis omitted) (quoting Cattle and Beef: Impact of the NAFTA and

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[24] "Cwt" means "hundredweight."

Uruguay Round Agreements on U.S. Trade, USITC Pub. 3048 at 2–16 (July 1997), *in* Plaintiffs' App.)), was not dispositive to the instant investigations where evidence shows Mexican imports increased 47.7 percent by head and more than 50 percent by weight from 1996 to 1997. (*See* Plaintiffs' Mem at 48.)

In support of its finding that there is no direct relationship between the pricing data for stocker/feeder cattle and fed cattle ready for immediate slaughter, the ITC cites to the staff report conclusion that "[t]here are clear price differences between slaughter cattle, feeder cattle, and yearling-stocker cattle, not only in absolute prices but sometimes also in the price trends." *Live Cattle from Mexico* at I–7. The ITC cites raw data within the staff report which demonstrates the absence of such a correlation. For example, the ITC cites to data of quarter-on-quarter comparisons of U.S.D.A. prices between 1996–97 which show increases in stocker[25] prices in every quarter (from 31 percent to 51 percent gains) while only slight increases or even decreases for slaughter prices (from 4 percent decreases to 10 percent gains). (*See* Def.'s and Def.-Intervenor's Joint Response to the Written Questions Presented by the Court at the Rule 56.2 Hearing and Joint Comments on the Court's "Schedule of Plaintiffs' Alleged Factual Errors by the ITC," Tab 2, para. 3 (citing *Live Cattle from Mexico* at Tables V–1 and V–2).) Further, the ITC cites to a response to staff questions which states, "there are separate markets—even separate futures markets—and separate prices for stockers and slaughter cattle." (Post-Conf. Brief of CNG, App. 1, at 3, AR Doc. 181, *in* Def.-Interv.'s App.)

The ITC additionally explains, in contrast to plaintiffs' assertions, that the Commission considered all pricing data for the entire period of investigation and not only for the 1996–1998 period. The ITC additionally argues "the Commission's 1997 [section] 332 study which found that feeder cattle prices decreased in 1996 * * * was not an antidumping investigation and the information and data gathered in that investigation were not for the same time period considered by the Commission here." (Def.'s Mem. at 41–42 n.128.)

After considering the evidence and the arguments of the parties, the Court finds the Commission's conclusion concerning the effect of imports from Mexico on domestic prices of live cattle is reasonable, not arbitrary or capricious, and not an abuse of discretion. First, concerning plaintiffs' contention that the Commission incorrectly relied on the absence of evidence of underselling by imports from Mexico whereas it discounted the evidence regarding the presence of underselling by imports from Canada, the Court finds plaintiffs' concern is without merit. "The Commission has discretion to ascertain which economic factors are rele-

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[25] It appears the ITC's reference to "stocker" cattle prices here correlates with the "feeder steers" identified in the charts to which the ITC cites in support of its finding that there is no direct relationship between the prices of stocker/feeder cattle and fed cattle ready for slaughter. The charts to which the ITC cites identify the products at issue as "feeder steers 300 to 400 pounds" and "500 to 550 pounds" as well as "fed steers intended for slaughter (1,200+ pounds)" and "fed heifers for slaughter (1,100+ pounds)." *Live Cattle from Mexico* at V–7 and V–8. The lighter animals appear to correlate with the ITC's description of "stocker" cattle submitted to the Court. (*See* Def.'s and Def.-Int.'s Jt. Resp. to the Court, Tab 2, para. 1 (stating stockers generally weigh between 400 pounds and 650 to 750 pounds).)

vant in an investigation, and the weight to be given those factors." *Torrington*, 790 F. Supp. at 1170 (citations omitted). In this case, the Commission found there was no evidence of underselling by imports from Mexico. The Commission also found, however, that the volume of imports from Mexico and market share were too small to affect domestic prices to a significant degree. The combination and interaction of these variables concerning subject imports from Mexico could lead the ITC reasonably to conclude that lack of underselling was a significant factor in this investigation. Although the reason for considering the absence of underselling a significant factor in its determination was not explicitly given, the path of the Commission's decision is discernible. *See Ceramica Regiomontana, S.A. v. United States*, 810 F.2d 1137, 1139 (Fed. Cir. 1987). Thus, this Court finds the ITC did not abuse its discretion in considering the absence of underselling by Mexican imports in its price determination.

Second, concerning the Commission's finding of no direct link between the prices of stocker/feeder cattle and fed cattle, the Court finds there is information on the record which supports the ITC's conclusion. For example, the ITC points to evidence indicating increases in stocker prices for each quarter between 1996 to 1997 while prices for slaughter cattle for the same period increased only slightly or even decreased. Further, the ITC cites evidence which states there are separate markets, even futures markets, between stocker cattle and slaughter cattle. Although such data is subject to interpretation, this Court cannot substitute its judgment for that of the ITC. *See Bowman*, 419 U.S. at 285. If the agency meets the requirement of articulating a "'rational connection between the facts found and the choice made,'" *id.* at 285 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)), the Court must sustain the decision. As this Court finds the ITC's finding of no direct link between stocker/feeder cattle and slaughter cattle prices may be reasonably discerned, the Court finds the ITC's determination was not arbitrary or capricious.

Plaintiffs' additional contentions are similarly not compelling. Concerning the allegation that the ITC focused on different time periods with respect to import volumes and domestic prices, it is clear from the record that the ITC had before it evidence regarding both the volume and price information for the relevant period of investigation. (*See Live Cattle from Mexico*, at IV–2 (volume) and Tables V–1 and V–2 (price)). "'Absent some showing to the contrary, the Commission is presumed to have considered all evidence in the record.'" *Connecticut Steel*, 852 F. Supp. at 1065 (quoting *Rhone Poulenc*, 592 F. Supp. at 1326 (citations omitted)). Further, the fact that the ITC chose not to focus on certain data in its main report does not indicate that the ITC failed to consider that information as "there is no statutory requirement that the Commission respond to each piece of evidence presented by the parties." *Granges Metallverken*, 716 F. Supp. at 24. Rather, such a finding merely indicates the ITC decided not to focus on such data in its main report.

Concerning plaintiffs' claim that the ITC abused its discretion in failing to follow or to explain its departure from previous findings that "'U.S. feeder cattle coupled with increased imports of feeder cattle from Mexico during 1995 contributed to the decline in feeder cattle prices [in 1996],'" (Pl.'s Mem. at 48 (emphasis omitted) (quoting Cattle and Beef: Impact of the NAFTA and Uruguay Round Agreements on U.S. Trade, USITC Pub. 3048 (July 1997), at 2–16, AR Doc. 232, *in* Plaintiffs' App.)), in a separate publication, this Court finds the ITC did not abuse its discretion. This Court has recognized that "'each injury investigation is *sui generis*, involving a unique combination and interaction of many economic variables; and consequently, a particular circumstance in a prior investigation cannot be regarded by the Commission as dispositive of the determination in a later investigation.'" *Citrosuco Paulista*, 704 F. Supp. at 1087–88 (quoting *Armstrong Bros. Tool Co. v. United States*, 84 Cust. Ct. 102, 115, 489 F. Supp. 269, 279 (1980)). As the ITC explained that the previous publication was not for an antidumping investigation and the information and data gathered were not for the same time period as this investigation, the Court finds the ITC did not abuse its discretion in apparently not relying on its previous finding in this determination.

3. *Impact of subject imports on domestic industry*

Plaintiffs also challenge the ITC's conclusion that subject imports from Mexico had no significant adverse impact on the domestic industry. Plaintiffs specifically state that they provided evidence to the ITC that "revenue effects from reductions in Mexican imports for [the cattle] industry would have ranged between $198.7 million and $596 million in 1997 alone (based solely on the impact on prices for fed cattle)." (Plaintiffs' Mem. at 48 (citing Post-Conf. Brief by Plaintiffs, Exhibit 10, AR Doc. 180, *in* Plaintiffs' App.).) Plaintiffs point to other evidence which showed "for each 100,000 head of feeder cattle there was a price drop of 0.555 percent, meaning the 668,000 head of cattle imported from Mexico in 1997 caused a 3.7 percent decline in U.S. feeder prices." (Plaintiffs' Mem. at 48 (footnote omitted) (citing Post-Conf. Brief by Plaintiffs, Exhibit 13, at 4, AR Doc. 180, *in* Plaintiffs' App.).) Moreover, plaintiffs argue, the ITC simply attributed the industry's weak performance in its analysis of Mexican imports to "'the liquidation phase of the cattle cycle,'" (Plaintiffs' Mem. at 49 (quoting *Live Cattle from Mexico* at 26)), overlooking evidence showing losses were the second highest in the Western region of the United States, "where most of the imports of Mexican cattle entered the United States," (Plaintiffs' Mem. at 49 (emphasis omitted) (citing *Live Cattle from Mexico* at VI–7)), despite having found imports from Canada, where the domestic industry's share of live cattle was the same as under the investigation concerning Mexican cattle, exacerbated the normal cyclical downturn.

Plaintiffs again do not argue successfully their claim of error regarding the ITC's consideration of the impact of imports from Mexico on the domestic industry. First, regarding the apparent failure of the ITC to

rely on the plaintiffs' models concerning the effects of Mexican imports on the U.S. cattle industry in terms of revenue and prices, it appears such evidence was before the Commission[26], but the ITC chose not to focus on such evidence. Rather, it appears the ITC focused on contrary evidence which showed prices of stocker cattle actually increased from 1996 to 1997.[27] In reviewing this evidence, this Court cannot substitute its judgment for that of the Commission. Rather, its role in reviewing a decision by the ITC is to ascertain whether there was a rational basis for the determination. *See, e.g., Torrington*, 790 F. Supp. at 1167 (citing *American Lamb*, 785 F.2d at 1004). Here, the ITC pointed to evidence on the record which supports its conclusion that the stocker prices for U.S. cattle increased between 1996 to 1997. This evidence appears to be actual evidence rather than estimated evidence cited to by the plaintiffs. Thus, the Court finds it was rational for the ITC to rely on evidence in the record, and the ITC did not abuse its discretion nor was it arbitrary or capricious in apparently not relying on the evidence presented by the plaintiffs in making its determination.

Second, regarding the effect of the share of Mexican cattle on the U.S. live cattle industry, while plaintiffs are correct that the domestic industry's share was the same, 95 percent, for the affirmative determination regarding Canadian cattle as it was for the negative determination regarding Mexican cattle, plaintiffs do not point to evidence which shows the ITC's determination regarding Mexican cattle was erroneous or not rational. The share of the U.S. live cattle market of imports from Mexico and Canada were different. For example, the Canadian share of domestic industry remained around 3–4 percent for the period of review.[28] *See Live Cattle from Mexico* at Table C–1. The share for Mexican cattle, however, decreased from 1.7 percent to 0.5 percent during the same period. *See id.* at 23 and Table C–1. Though the difference is small, the ITC concluded the difference was sufficient to have differing impacts on the domestic industry. As there appears to be a rational basis for the ITC's determination and as the plaintiffs have not identified evidence to the contrary, plaintiffs have not proven the ITC's determination regarding Mexican cattle was erroneous or not rational.

D. *Likelihood of Finding Contrary Evidence in Final Investigation*

Finally, plaintiffs argue the Commission should have issued an affirmative preliminary determination in this case in order to collect further information in a final investigation. The ITC, when making its deter-

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[26] Plaintiffs state in their principal brief that they "presented evidence" about the revenue effects and price effects from Mexican imports of live cattle to the Commission, (*see* Plaintiffs' Mem. at 48), and such evidence appears to have been part of the record. (*See* plaintiffs' cited support for its contentions at Post-Conf. Brief by Plaintiffs, AR Doc. 180, Exhibits 10 and 13, *in* Appendix of Public Record Documents to Accompany Plaintiffs' Rule 56.2 Motion for Judgment Upon the Agency Record (Plaintiffs' App.).)

[27] This evidence appears to conflict with plaintiffs' studies showing "for each 100,000 head of feeder cattle [imported from Mexico] there was a price drop of 0.555 percent." (Plaintiffs' Mem. at 48 (citing Post-Conf. Brief by Plaintiffs, AR Doc. 180, Exhibits 13, at 4, *in* Plaintiffs' App.).) Reference in this report to "feeder" cattle, apparently concerning 400 to 500 pound steer (*see* Post-Conf. Brief by Plaintiffs, AR Doc. 180, Exhibit 13, at 3, *in* Plaintiffs' App.), appears to correspond to the definition of "stocker" cattle as identified in this opinion and substantially agreed to by the parties. *See supra* note 2.

[28] 3.4 percent in 1995; 4.2 percent in 1996; 3.8 percent in 1997; 4.0 percent in January to October 1997; and 4.0 percent in January to October 1998. *See Live Cattle from Mexico* at Table C–1.

mination, however, must decide whether there is a reasonable indication for finding "no likelihood exists that *contrary* evidence will arise in a final investigation." *American Lamb*, 785 F.2d at 1001 (emphasis added). The Commission is not required to determine whether there is a reasonable indication *additional* information may be collected. Given that the ITC weighed the evidence in the record and that its negative determination was based upon comprehensive and complete information using official U.S. Department of Agriculture data, official import statistics, and responses on the domestic industry, the validity of which the plaintiffs do not challenge, the Court finds there was a rational basis for the Commission's conclusion that no likelihood exists that contrary evidence will arise in a final investigation.

CONCLUSION

After considering all of the plaintiffs' arguments and for the reasons stated above, the Court holds the ITC's negative preliminary injury determination concerning live cattle from Mexico was not arbitrary or capricious, not an abuse of discretion, and was otherwise in accordance with law. Therefore, the Court denies plaintiffs' motion and sustains the ITC's negative preliminary injury determination concerning live cattle from Mexico in *Live Cattle from Canada and Mexico*, 64 Fed. Reg. 3716 (Jan. 25, 1999). This action is dismissed.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C99/135 Watson, J. 10/15/99	MKG Cartridge Systems, Inc.	99-2-00095	3707.90.32 7.3% or 6.9%	8473.30.50 Free of duty	Agreed statement of facts	Buffalo Toner cartridges
C99/136 Watson, J. 10/15/99	Royal Proteins Inc.	96-10-02358	3504.00.50 7.2%	0402.10.00 3.3%	Agreed statement of facts	Chicago "Nutrilac SA-3610"
C99/137 Goldberg, J. 10/26/99	AMKO	94-4-00218	2002.10.00 100% pursuant to 9003.23.17	2103.90.60 or 2103.90.90 7.5%, 7.3%, and 7.1%	Agreed statement of facts	New York Tomato sauce preparation
C99/138 Goldberg, J. 10/26/99	Orlando Food Corp.	94-5-00290-S	2002.10.00 100% pursuant to 9003.23.17	2103.90.60 or 2103.90.90 7.5%, 7.3%, and 7.1%	Agreed statement of facts	New York Tomato sauce preparation
C99/139 Goldberg, J. 10/26/99	AMKO Int'l Trading Inc.	94-9-00520-S	2002.10.00 100% pursuant to 9003.23.17	2103.90.60 or 2103.90.90 7.5%, 7.3%, and 7.1%	Agreed statement of facts	New York Tomato sauce preparation
C99/140 Goldberg, J. 10/26/99	Orlando Food Corp.	94-9-00521-S	2002.10.00 100% pursuant to 9003.23.17	2103.90.60 or 2103.90.90 7.5%, 7.3%, and 7.1%	Agreed statement of facts	New York Tomato sauce preparation
C99/141 10/28/99 Aquilino, J.	Alcan Aluminum Corp.	94-10-00590	7601.20.90 Free of duty with merchandising processing fee for goods not originating in the territory of Canada	CA7601.20.90 Free of duty at lower merchandising processing and entitled to preferential treatment under the U.S.-Canada Free Trade Agreement	Alcan Corp. *v.* U.S., 165 F.3d 898 (1999)	St. Albans, VT Aluminum in various forms and shapes

ABSTRACTED CLASSIFICATION DECISIONS—*Continued*

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C99/142 Goldberg, J. 10/26/99	Orlando Food Corp.	95–3–00252–S	2002.10.00 100% pursuant to 9003.23.17	2130.90.60 or 2103.90.90 7.5%, 7.3%, and 7.1%	Agreed statement of facts	New York Tomato sauce preparation
C99/143 Goldberg, J. 10/26/99	AMKO Int'l Trading Corp.	95–9–00176–S	2002.10.00 100% pursuant to 9003.23.17	2130.90.60 or 2103.90.90 7.5%, 7.3%, and 7.1%	Agreed statement of facts	New York Tomato sauce preparation
C99/144 Restani, J. 10/27/99	Chrysler Corp.	91–3–00173, 92–1–00005	8404.31 25%	8703.42 2.5%	Agreed statement of facts	Laredo Chrysler Ramcharger sport utility vehicles
C99/145 10/28/99 Aquilino, J.	Canadian Reynolds Metals Co.	95–3–00312	7601.20.90 Free of duty with merchandising processing fee for goods not originating in the territory of Canada	CA7601.20.90 Free of duty at lower merchandising processing and entitled to preferential treatment under the U.S.-Canada Free Trade Agreement	Alcan Corp. *v.* U.S., 165 F.3d 898 (1999)	Detroit Aluminum in various forms and shapes
C99/146 Musgrave, J. 11/3/99	Clarendon Marketing, Inc.	92–12–00826	2710.00.18 52.5¢ per barrel	2710.00.45 10.5¢ per barrel	Agreed statement of facts	Newark Naphtha
C99/147 Musgrave, J. 11/3/99	Glencore Marketing, Inc.	94–3–00196	2710.00.18 52.5¢ per barrel	2710.00.45 10.5¢ per barrel	Agreed statement of facts	Guyanilla P.R. Naphtha
C99/148 Musgrave, J. 11/3/99	Clarendon Marketing, Inc.	94–8–00455	2710.00.18 52.5¢ per barrel	2710.00.45 10.5¢ per barrel	Agreed statement of facts	Guyanilla, P.R. Naphtha

C99/149 Musgrave, J. 11/3/99	Glencore Marketing, Inc.	94–11–00715	2710.00.18 52.5¢ per barrel	2710.00.45 10.5¢ per barrel	Agreed statement of facts	Guyanilla PR. Naphtha
C99/150 Musgrave, J. 11/3/99	Glencore Marketing, Inc.	95–5–00641	2710.00.18 52.5¢ per barrel	2710.00.45 10.5¢ per barrel	Agreed statement of facts	Houston Naphtha

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